TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 362.

THE UNITED STATES, PETITIONER,

vs.

JOHN W. DICKINSON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 25, 1908.
CERTIORARI AND RETURN FILED MAY 11, 1908.

(21134)

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United States Circuit Court of Appeals for the First Circuit. October Term, 1906.

JOHN W. DICKINSON, DEFENDANT, PLAINTIFF IN ERROR,
vs.
UNITED STATES OF AMERICA, PLAINTIFF, DEFENDANT IN error. } No. 681.

Error to the District Court of the United States for the District of Massachusetts. Judgment in District Court (Dodge, J.), August 10, 1906. Record.

Henry W. Dunn, Powers & Hall, for plaintiff in error. Asa P. French, United States attorney. William H. Garland, Assistant United States attorney, for defendant in error.

1 United States Circuit Court of Appeals for the First Circuit. October Term, 1906.

JOHN W. DICKINSON, DEFENDANT, PLAINTIFF IN ERROR,
vs.
UNITED STATES OF AMERICA, PLAINTIFF, DEFENDANT IN error. } No. 681.

Writ of error.

[L. S.] UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judge of the District Court of the United States for the District of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between the United States of America, plaintiff, and John W. Dickinson, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, together with this writ, so that you have the same at the city of Boston, Massachusetts, on the sixth day of September next, in the said Circuit Court of Appeals, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of

2 right and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of August, in the year of our Lord one thousand nine hundred and six.

FRANK H. MASON,
Clerk of the District Court of the United States,
District of Massachusetts.

Allowed by:

FREDERIC DODGE,
U. S. District Judge.

Return of District Court on writ of error.

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS, *ss:*

And now, here, the Judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the said District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In testimony whereof, I, Frank H. Mason, clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said court this sixteenth day of October, A. D. 1906.

[SEAL] FRANK H. MASON, *Clerk.*

3 *Transcript of record of District Court.*

(Filed in Circuit Court of Appeals October 22, 1906.)

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS:

At a District Court of the United States begun and holden at Boston within and for the District of Massachusetts on the fourth Tuesday (being the twenty-sixth day) of June, in the year of our Lord one thousand nine hundred and six.

Before

The Honorable FREDERIC DODGE,
District Judge.

THE UNITED STATES BY INDICTMENT
vs.
GEORGE M. FOSTER AND JOHN W. DICKINSON.

The jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that before and at the time of the commission of the offence hereinafter charged The South Danvers National Bank was duly and legally organized and established as a national banking association under and by virtue of the laws of the United States of America, and was on the day

and at the time of the commission of said offence duly and legally existing, located and doing business as such national banking association at Peabody in the District of Massachusetts, and before and at the time of the commission of said offence had an account and credit with The Suffolk National Bank of Boston, a national banking association duly and legally organized and established under and by virtue of said laws, duly and legally existing, located and doing business as such national banking association, at Boston in said District of Massachusetts, and did from time to time at, before and after the commission of said offence make deposits of moneys, funds and credits to the credit of its said account with said The Suffolk National Bank of Boston, and did at all said times charge its said account for moneys, funds and credits paid and applied by said The Suffolk National Bank of Boston for the use and purposes of
4 said The South Danvers National Bank; that on the day and at the time of the commission of said offence one George M. Foster was cashier of said The South Danvers National Bank, and as such cashier did assist said The South Danvers National Bank in the transaction of its said banking business.

That said George M. Foster, of Peabody, in the District of Massachusetts, on the nineteenth day of March, in the year of our Lord one thousand nine hundred, at Boston in said District of Massachusetts, well knowing the premises, then and there being such cashier of said The South Danvers National Bank, certain money of said The South Danvers National Bank, to the amount and of the value in all of three thousand five hundred and thirty-seven dollars and ninety-two cents, certain funds of said The South Danvers National Bank, to the amount and of the value in all of three thousand five hundred and thirty-seven dollars and ninety-two cents, said credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of three thousand five hundred and thirty-seven dollars and ninety-two cents, certain credits of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of three thousand five hundred and thirty-seven dollars and ninety-two cents, a certain credit of said The South Danvers National Bank, to the amount and of the value of three thousand five hundred and thirty-seven dollars and ninety-two cents, a certain credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston to the amount and of the value of three thousand five hundred and thirty-seven dollars and ninety-two cents, a more particular description of said money, funds, credit and credits being to said jurors unknown, did then and there, to wit, on said nineteenth day of March, at said Boston, in said District of Massachusetts, without the knowledge and without the consent of said The South Danvers National Bank, wilfully misapply, by then and there unlawfully, fraudulently, knowingly, wilfully and designedly without the knowledge and without the consent of said The South Danvers National Bank converting said money, funds, credit and credits and each

thereof to the use, benefit and advantage of one John W. Dickinson, of Newton, in said District of Massachusetts, thereby depriv-
5 ing said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And so the jurors aforesaid on their oath aforesaid do say and present that said George M. Foster, such cashier as aforesaid, said money, funds, credit and credits, each of the value as aforesaid, of the moneys, funds and credits of said The South Danvers National Bank unlawfully, fraudulently, knowingly, wilfully and designedly in manner and form aforesaid on said nineteenth day of March, at said Boston, in said District of Massachusetts, did wilfully misapply and convert to the use, benefit and advantage of said John W. Dickinson, and deprive said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And said jurors on their oath aforesaid do further present and say that the said John W. Dickinson, of Newton, in said District of Massachusetts, on said nineteenth day of March, at said Boston, in said District of Massachusetts, well knowing the premises, and well knowing that said George M. Foster was then such cashier of said The South Danvers National Bank did unlawfullly, fraudulently, knowingly, wilfully and designedly incite, move, procure, counsel, hire, command, aid and abet the said Foster, such cashier of said The South Danvers National Bank, the said offense and crime of wilfully misapplying the said money, funds, credit and credits of said The South Danvers National Bank, in manner and form and with the intent aforesaid to do and commit, with intent of him, said Dickinson, then and thereby said The South Danvers National Bank to injure and defraud.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for The United States of America, within and for the District of Massachusetts, upon ther oath aforesaid do further present that before and at the time of the commis-
6 sion of the offense hereinafter charged The South Danvers National Bank was duly and legally organized and established as a national banking association under and by virtue of the laws of the United States of America, and was on the day and at the time of the commission of said offence duly and legally existing, located and doing business as such national banking association at Peabody in the District of Massachusetts; that on the day and at the time of the commission of said offence one George M. Foster was cashier of said The South Danvers National Bank, and as such cashier did assist said The South Danvers National Bank in the transaction of its said banking business.

That said George M. Foster, of Peabody, in the District of Massachusetts, on the twenty-fourth day of January, in the year of our Lord one thousand nine hundred, at said Peabody, in said District of Massachusets, then and there being such cashier of said The South Danvers National Bank, certain money of said The South Danvers National Bank, to the amount and of the value in all of five thousand dollars, certain funds of said The South Danvers National Bank, to the amount and of the value in all of five thousand dollars, certain credits of said The South Danvers National Bank, to the amount and of the value in all of five thousand dollars, a more particular description of said money, funds and credits and of the values thereof being to said jurors unknown, did then and there, to wit, on said twenty-fourth day of January, at said Peabody, without the knowledge and without the consent of said The South Danvers National Bank, wilfully misapply, by then and there unlawfully, fraudulently, knowingly, wilfully and designedly without the knowledge and without the consent of said The South Danvers National Bank converting said money, funds and credits and each thereof to the use, benefit and advantage of one John W. Dickinson, of Newton, in said District of Massachusetts, thereby depriving said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And so the jurors aforesaid on their oath aforesaid do say and present that said George M. Foster, such cashier as aforesaid,
7 said money, funds and credits, each of the value as aforesaid, of the moneys, funds and credits of said The South Danvers National Bank unlawfully, fraudulently, knowingly, wilfully and designedly in manner and form aforesaid on said twenty-fourth day of January, at said Peabody, in said District of Massachusetts, did wilfully misapply and convert to the use, benefit and advantage of said John W. Dickinson, and deprive said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And said jurors on their oath aforesaid do further present and say that the said John W. Dickinson, of Newton, in said District of Massachusetts, on said twenty-fourth day of January, at said Peabody, in said District of Massachusetts, well knowing the premises, and well knowing that said George M. Foster was then such cashier of said The South Danvers National Bank, did unlawfully, fraudulently, knowingly, wilfully and designedly incite, move, procure, counsel, hire, command, aid and abet the said Foster, such cashier of said The South Danvers National Bank, the said offence and crime of wilfully misapplying the said money, funds and credits of said The South Danvers National Bank, in manner and form and with the intent aforesaid to do and commit, with intent of him, said

Dickinson, then and thereby said The South Danvers National Bank to injure and defraud.

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for The United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that before and at the time of the commission of the offence hereinafter charged The South Danvers National Bank was duly and legally organized and established as a national banking association under and by virtue of the laws of the United States of America, and was on the day and at the time of the commission of said offence duly and legally existing, located and doing business as such national banking association at Peabody, in the District of Massachusetts, and before and at the time of the commission
8 of said offence had an account and credit with The Suffolk National Bank of Boston, a national banking association duly and legally organized and established under and by virtue of said laws, duly and legally existing, located and doing business as such national banking association, at Boston in said District of Massachusetts, and did from time to time at, before and after the commission of said offence make deposits of moneys, funds and credits to the credit of its said account with said The Suffolk National Bank of Boston, and did at all said times charge its said account for moneys, funds and credits paid and applied by said The Suffolk National Bank of Boston for the use and purposes of said The South Danvers National Bank; that on the day and at the time of the commission of said offence one George M. Foster was cashier of said The South Danvers National Bank, and as such cashier did assist said The South Danvers National Bank in the transaction of its said banking business.

That said George M. Foster, of Peabody, in the District of Massachusetts, on the fourteenth day of May in the year of our Lord one thousand nine hundred, at Boston, in said District of Massachusetts, well knowing the premises, then and there being such cashier of said The South Danvers National Bank, certain money of said The South Danvers National Bank, to the amount and of the value in all of two thousand four hundred and eighty-eight dollars, certain funds of said The South Danvers National Bank, to the amount and of the value in all of two thousand four hundred and eighty-eight dollars, said credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of two thousand four hundred and eighty-eight dollars, certain credits of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of two thousand four hundred and eighty-eight dollars, a certain credit of said The South Danvers National Bank, to the amount and of the value of two thousand four hundred and eighty-eight dollars, a certain credit of said The South Danvers National Bank

with said The Suffolk National Bank of Boston to the amount and of the value of two thousand four hundred and eighty-eight dollars, a more particular description of said money, funds, credit and
9 credits being to said jurors unknown, did then and there, to wit, on said fourteenth day of May, at said Boston, in said District of Massachusetts, without the knowledge and without the consent of said The South Danvers National Bank, wilfully misapply by then and there unlawfully, fraudulently, knowingly, wilfully and designedly without the knowledge and without the consent of said The South Danvers National Bank converting said money, funds, credit and credits and each thereof to the use, benefit and advantage of one John W. Dickinson, of Newton, in said District of Massachusetts, thereby depriving said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And so the jurors aforesaid on their oath aforesaid do say and present that said George M. Foster, such cashier as aforesaid, said money, funds, credit and credits, each of the value as aforesaid, of the moneys, funds and credits, of said The South Danvers National Bank unlawfully, fraudulently, knowingly, wilfully and designedly in manner and form aforesaid on said fourteenth day of May, at said Boston, in said District of Massachusetts, did wilfully misapply and convert to the use, benefit and advantage of said John W. Dickinson, and deprive said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And said jurors on their oath aforesaid do further present and say that the said John W. Dickinson, of Newton, in said District of Massachusetts, on said fourteenth day of May at said Boston in said District of Massachusetts, well knowing the premises, and well knowing that said George M. Foster was then such cashier of said The South Danvers National Bank did unlawfully, fraudulently, knowingly, wilfully and designedly incite, move, procure, counsel, hire, command, aid and abet the said Foster, such cashier of said The South Danvers National Bank, the said offence and crime of wilfully misapplying the said money, funds, credit and credits of said The South Danvers National Bank, in manner and form and with the intent aforesaid to do and commit, with intent of him, said
10 Dickinson, then and thereby said The South Danvers National Bank to injure and defraud.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for the United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that before and at the time of the commission of the offence hereinafter charged The South Danvers National Bank was

duly and legally organized and established as a national banking association under and by virtue of the laws of the United States of America, and was on the day and at the time of the commission of said offence duly and legally existing, located and doing business as such banking association, at Peabody, in the District of Massachusetts, and before and at the time of the commission of said offence had an account and credit with The Suffolk National Bank of Boston, a national banking association duly and legally organized and established under and by virtue of said laws, duly and legally existing, located and doing business as such national banking association, at Boston, in said District of Massachusetts, and did from time to time at, before and after the commission of said offence make deposits of moneys, funds and credits to the credit of its said account with said The Suffolk National Bank of Boston, and did at all said times charge its said account for moneys, funds and credits paid and applied by said The Suffolk National Bank of Boston for the use and purposes of said The South Danvers National Bank; that on the day and at the time of the commission of said offence one George M. Foster was cashier of said The South Danvers National Bank, and as such cashier did assist said The South Danvers National Bank in the transaction of its said banking business.

That said George M. Foster, of Peabody, in the District of Massachusetts, on the tenth day of June, in the year of our Lord one thousand eight hundred and ninety-nine, at Boston in said District of Massachusetts, well knowing the premises, then and there being such cashier of said The South Danvers National Bank, certain money of said The South Danvers National Bank, to the amount and of the value in all of four thousand dollars, certain funds of said The
11 South Danvers National Bank, to the amount and of the value in all of four thousand dollars, said credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value of four thousand dollars, certain credits of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of four thousand dollars, a certain credit of said The South Danvers National Bank, to the amount and of the value of four thousand dollars, a certain credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston to the amount and of the value of four thousand dollars, a more particular description of said money, funds, credit and credits being to said jurors unknown, did then and there, to wit, on said tenth day of June, at said Boston, in said District of Massachusetts, without the knowledge and without the consent of said The South Danvers National Bank, wilfully misapply, by then and there unlawfully, fraudulently, knowingly, wilfully and designedly without the knowledge and without the consent of said The South Danvers National Bank converting said money, funds, credit and credits and each thereof to the use, benefit and advantage of one John W. Dickinson, of Newton, in said District of Massachusetts, thereby depriving said The South Danvers

National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And so the jurors aforesaid on their oath aforesaid do say and present that said George M. Foster, such cashier as aforesaid, said money, funds, credit and credits, each of the value as aforesaid, of the moneys, funds and credits of said The South Danvers National Bank unlawfully, fraudulently, knowingly, wilfully and designedly in manner and form aforesaid on said tenth day of June, at said Boston, in said District of Massachusetts, did wilfully misapply and convert to the use, benefit and advantage of said John W. Dickinson, and deprive said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

12 And said jurors on their oath aforesaid do further present and say that the said John W. Dickinson, of Newton, in said District of Massachusetts, on said tenth day of June, at said Boston, in said District of Massachusetts, well knowing the premises, and well knowing that said George M. Foster was then such cashier of said The South Danvers National Bank did unlawfully, fraudulently, knowingly, wilfully and designedly incite, move, procure, counsel, hire, command, aid and abet the said Foster, such cashier of said The South Danvers National Bank, the said offence and crime of wilfully misapplying the said money, funds, credit and credits of said The South Danvers National Bank, in manner and form and with the intent aforesaid to do and commit, with intent of him, said Dickinson, then and thereby said The South Danvers National Bank to injure and defraud.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for The United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that before and at the time of the commission of the offence hereinafter charged The South Danvers National Bank was duly and legally organized and established as a national banking association under and by virtue of the laws of the United States of America, and was on the day and at the time of the commission of said offence duly and legally existing, located and doing businses as such national banking association at Peabody, in the District of Massachusetts, and before and at the time of the commission of said offence had an account and credit with The Suffolk National Bank of Boston, a national banking association duly and legally organized and established under and by virtue of said laws, duly and legally existing, located and doing business as such national banking association, at Boston, in said District of Massachusetts, and did from time to time at, before and after the commission of said offence make deposits of moneys, funds and credits to the credit of its said

account with said The Suffolk National Bank of Boston, and did at all said times charge its said account for moneys, funds and credits paid and applied by said The Suffolk National Bank of Boston
13 for the use and purposes of said The South Danvers National Bank; that on the day and at the time of the commission of said offence one George M. Foster was cashier of said The South Danvers National Bank, and as such cashier did assist said The South Danvers National Bank in the transaction of its said banking business.

That said George M. Foster, of Peabody, in the District of Massachusetts, on the thirteenth day of June, in the year of our Lord one thousand eight hundred and ninety-nine, at Boston, in said District of Massachusetts, well knowing the premises, then and there being such cashier of said The South Danvers National Bank, certain money of said The South Danvers National Bank, to the amount and of the value in all of four thousand five hundred dollars, certain funds of said The South Danvers National Bank, to the amount and of the value in all of four thousand five hundred dollars, said credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value of four thousand five hundred dollars, certain credits of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of four thousand five hundred dollars, a certain credit of said The South Danvers National Bank, to the amount and of the value of four thousand five hundred dollars, a certain credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston to the amount and of the value of four thousand five hundred dollars, a more particular description of said money, funds, credit and credits being to said jurors unknown, did then and there, to wit, on said thirteenth day of June, at said Boston, in said District of Massachusetts, without the knowledge and without the consent of said The South Danvers National Bank, wilfully misapply, by then and there unlawfully, fraudulently, knowingly, wilfully and designedly without the knowledge and without the consent of said The South Danvers National Bank converting said money, funds, credit and credits and each thereof to the use, benefit and advantage of one John W. Dickinson, of Newton, in said District of Massachusetts, thereby depriving said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such
14 cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And so the jurors aforesaid on their oath aforesaid do say and present that said George M. Foster, such cashier as aforesaid, said money, funds, credit and credits, each of the value as aforesaid, of the moneys, funds and credits of said The South Danvers National Bank unlawfully, fraudulently, knowingly, wilfully and designedly in manner and form aforesaid on said thirteenth day of June at said Boston, in said District of Massachusetts, did wilfully misapply and

convert to the use, benefit and advantage of said John W. Dickinson, and deprive said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And said jurors on their oath aforesaid do further present and say that the said John W. Dickinson, of Newton, in said District of Massachusetts, on said thirteenth day of June, at said Boston, in said District of Massachusetts, well knowing the premises, and well knowing that said George M. Foster was then such cashier of said The South Danvers National Bank did unlawfully, fraudulently, knowingly, wilfully and designedly incite, move, procure, counsel, hire, command, aid and abet the said Foster, such cashier of said The South Danvers National Bank, the said offence and crime wilfully misapplying the said money, funds, credit and credits of said The South Danvers National Bank, in manner and form and with the intent aforesaid to do and commit, with intent of him, said Dickinson, then and thereby said The South Danvers National Bank to injure and defraud.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for the United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that before and at the time of the commission of the offence hereinafter charged The South Danvers National Bank was duly and legally organized and established as a national banking association under and by virtue of the laws of the United States of America, and was on the day and at the time of the commission of said offence duly and legally existing, located and doing business as such national banking association at Peabody, in the District of Massachusetts; that on the day and at the time of the commission of said offence one George M. Foster was cashier of said The South Danvers National Bank, and as such cashier did assist said The South Danvers National Bank in the transaction of its said banking business.

That said George M. Foster, of Peabody, in the District of Massachusetts, on the fifteenth day of February, in the year of our Lord one thousand nine hundred, at said Peabody, in said District of Massachusetts, then and there being such cashier of said The South Danvers National Bank, certain money of said The South Danvers National Bank, to the amount and of the value in all of two thousand five hundred dollars, certain funds of said The South Danvers National Bank, to the amount and of the value in all of two thousand five hundred dollars, certain credits of said The South Danvers National Bank, to the amount and of the value in all of two thousand five hundred dollars, a more particular description of said money, funds and credits and of the values thereof being to said jurors unknown, did then and there, to wit, on said fifteenth day of Febru-

ary, at said Peabody, without the knowledge and without the consent of said The South Danvers National Bank, wilfully misapply, by then and there unlawfully, fraudulently, knowingly, wilfully and designedly without the knowledge and without the consent of said The South Danvers National Bank converting said money, funds and credits and each thereof to the use, benefit and advantage of one John W. Dickinson, of Newton, in said District of Massachusetts, thereby depriving said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And so the jurors aforesaid on their oath aforesaid do say and present that said George M. Foster, such cashier as aforesaid, said money, funds and credits, each of the value as aforesaid, of the moneys, funds and credits of said The South Danvers National Bank unlawfully, fraudulently, knowingly, wilfully and designedly
16 in manner and form aforesaid on said fifteenth day of February, at said Peabody, in said District of Massachusetts did wilfully misapply and convert to the use, benefit and advantage of said John W. Dickinson, and deprive said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And said jurors on their oath aforesaid do further present and say that the said John W. Dickinson, of Newton, in said District of Massachusetts, on said fifteenth day of February at said Peabody in said District of Massachusetts, well knowing the premises, and well knowing that said George M. Foster was then such cashier of said The South Danvers National Bank, did unlawfully, fraudulently, knowingly, wilfully and designedly incite, move, procure, counsel, hire, command, aid and abet the said Foster, such cashier of said The South Danvers National Bank, the said offence and crime of wilfully misapplying the said money, funds and credits of said The South Danvers National Bank, in manner and form and with the intent aforesaid to do and commit, with intent of him, said Dickinson, then and thereby said The South Danvers National Bank to injure and defraud.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for The United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that before and at the time of the commission of the offence hereinafter charged The South Danvers National Bank was duly and legally organized and established as a national banking association under and by virtue of the laws of the United States of America, and was on the day and at the time of the commission of said offence duly and legally existing, located and doing business as

such national banking association at Peabody, in the District of Massachusetts, and before and at the time of the commission of said offence had an account and credit with The Suffolk National Bank of Boston, a national banking association duly and legally organized and established under and by virtue of said laws, duly and
17 legally existing, located and doing business as such national banking association, at Boston in said District of Massachusetts, and did from time to time at, before and after the commission of said offence make deposits of moneys, funds and credits to the credit of its said account with said The Suffolk National Bank of Boston, and did at all said times charge its said account for moneys, funds and credits paid and applied by said The Suffolk National Bank of Boston for the use and purposes of said The South Danvers National Bank; that on the day and at the time of the commission of said offence one George M. Foster was cashier of said The South Danvers National Bank, and as such cashier did assist said The South Danvers National Bank in the transaction of its said banking business.

That said George M. Foster, of Peabody, in the District of Massachusetts, on the twenty-first day of February in the year of our Lord one thousand nine hundred, at Boston, in said District of Massachusetts, well knowing the premises, then and there being such cashier of said The South Danvers National Bank, certain money of said The South Danvers National Bank, to the amount and of the value in all of two thousand five hundred dollars, certain funds of said The South Danvers National Bank, to the amount and of the value in all of two thousand five hundred dollars, said credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of two thousand five hundred dollars, certain credits of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of two thousand five hundred dollars, a certain credit of said The South Danvers National Bank, to the amount and of the value of two thousand five hundred dollars, a certain credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston to the amount and of the value of two thousand five hundred dollars, a more particular description of said money, funds, credit and credits being to said jurors unknown, did then and there, to wit, on said twenty-first day of February, at said Boston, in said District of Massachusetts, without the knowledge and without the consent of said The South Danvers National Bank, wilfully misapply, by then and there unlawfully, fraudulently, knowingly, wilfully and designedly without the knowledge and without the consent of
18 said The South Danvers National Bank converting said money, funds, credit and credits and each thereof to the use, benefit and advantage of one John W. Dickinson, of Newton, in said District of Massachusetts, thereby depriving said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and

thereby to injure and defraud said The South Danvers National Bank.

And so the jurors aforesaid on their oath aforesaid do say and present that George M. Foster, such cashier as aforesaid, said money, funds, credit and credits, each of the value as aforesaid, of the moneys, funds and credits of said The South Danvers National Bank unlawfully, fraudulently, knowingly, wilfully and designedly in manner and form aforesaid on said twenty-first day of February, at said Boston, in said District of Massachusetts, did wilfully misapply and convert to the use, benefit and advantage of said John W. Dickinson, and deprive said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And said jurors on their oath aforesaid do further present and say that the said John W. Dickinson, of Newton, in said District of Massachusetts, on said twenty-first day of February, at said Boston in said District of Massachusetts, well knowing the premises, and well knowing that said George M. Foster was then such cashier of said The South Danvers National Bank did unlawfully, fraudulently, knowingly, wilfully and designedly incite, move, procure, counsel, hire, command, aid and abet the said Foster, such cashier of said The South Danvers National Bank, the said offence and crime of wilfully misapplying the said money, funds, credit and credits of said The South Danvers National Bank, in manner and form and with the intent aforesaid to do and commit, with intent of him, said Dickinson, then and thereby said The South Danvers National Bank to injure and defraud.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

19 And the jurors aforesaid for The United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that before and at the time of the commission of the offence hereinafter charged The South Danvers National Bank was duly and legally organized and established as a national banking association under and by virtue of the laws of the United States of America, and was on the day and at the time of the commission of said offence duly and legally existing, located and doing business as such national banking association at Peabody, in the District of Massachusetts, and before and at the time of the commission of said offence had an account and credit with The Suffolk National Bank of Boston, a national banking association duly and legally organized and established under and by virtue of said laws, duly and legally existing, located and doing business as such national banking association, at Boston, in said District of Massachusetts, and did from time to time at, before and after the commission of said offence make deposits of moneys, funds and credits to the credit of its said account with said The Suffolk National Bank of Boston, and did

at all said times charge its said account for moneys, funds and credits paid and applied by said The Suffolk National Bank of Boston for the use and purposes of said The South Danvers National Bank; that on the day and at the time of the commission of said offence one George M. Foster was cashier of said The South Danvers National Bank, and as such cashier did assist said The South Danvers National Bank in the transaction of its said banking business.

That George M. Foster, of Peabody, in the District of Massachusets, on the twenty-eighth day of November in the year of our Lord one thousand eight hundred and ninety-nine, at Boston, in said District of Massachusetts, well knowing the premises, then and there being such cashier of said The South Danvers National Bank, certain money of said The South Danvers National Bank, to the amount and of the value in all of four thousand five hundred dollars, certain funds of said The South Danvers National Bank, to the amount and of the value in all of four thousand five hundred dollars, said credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value of four thousand five hundred dollars, certain credits of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of four thousand five hundred dollars, a certain credit of said The South Danvers National Bank, to the amount and of the value of four thousand five hundred dollars, a certain credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston to the amount and of the value of four thousand five hundred dollars, a more particular description of said money, funds, credit and credits being to said jurors unknown, did then and there, to wit, on said twenty-eighth day of November, at said Boston, in said District of Massachusetts, without the knowledge and without the consent of said The South Danvers National Bank, wilfully misapply, by then and there unlawfully, fraudulently, knowingly, wilfully and designedly without the knowledge and without the consent of said The South Danvers National Bank converting said money, funds, credit and credits and each thereof to the use, benefit and advantage of one John W. Dickinson, of Newton, in said District of Massachusetts, thereby depriving said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And so the jurors aforesaid on their oath aforesaid do say and present that said George M. Foster, such cashier as aforesaid, said money, funds, credit and credits, each of the value as aforesaid, of the moneys, funds, and credits of said The South Danvers National Bank unlawfully, fraudulently, knowingly, wilfuflly, and designedly in manner and form aforesaid on said twenty-eighth day of November at said Boston in said District of Massachusetts did wilfully

misapply and convert to the use, benefit, and advantage of said John W. Dickinson, and deprive said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And said jurors on their oath aforesaid do further present and say that the said John W. Dickinson, of Newton, in said District of Massachusetts, on said twenty-eighth day of November, at said Boston, in said District of Massachusetts, well knowing the premises, and well knowing that said George M. Foster was then
21 such cashier of said The South Danvers National Bank did unlawfully, fraudulently, knowingly, wilfully, and designedly incite, move, procure, counsel, hire, command, aid and abet the said Foster, such cashier of said The South Danvers National Bank, the said offence and crime of wilfully misapplying the said money, funds, credit and credits of said The South Danvers National Bank, in manner and form and with the intent aforesaid to do and commit, with intent of him, said Dickinson, then and thereby said The South Danvers National Bank to injure and defraud.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for The United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that before and at the time of the commission of the offence hereinafter charged The South Danvers National Bank was duly and legally organized and established as a national banking association under and by virtue of the laws of the United States of America, and was on the day and at the time of the commission of said offence duly and legally existing, located and doing business as such national banking association at Peabody in the District of Massachusetts, and before and at the time of the commission of said offence had an account and credit with The Suffolk National Bank of Boston, a national banking association duly and legally organized and established under and by virtue of said laws, duly and legally existing, located and doing business as such national banking association, at Boston in said District of Massachusetts, and did from time to time at, before and after the commission of said offence make deposits of moneys, funds and credits to the credit of its said account with said The Suffolk National Bank of Boston, and did at all said times charge its said account for moneys, funds and credits paid and applied by said The Suffolk National Bank of Boston for the use and purposes of said The South Danvers National Bank; that on the day and at the time of the commission of said offence one George M. Foster was cashier of said The South Danvers National Bank, and as such cashier did assist said The South Danvers National Bank in the transaction of its said banking business.

22 That said George M. Foster, of Peabody, in the District of Massachusetts, on the twenty-seventh day of November, in the year of our Lord one thousand eight hundred and ninety-nine, at

Boston in said District of Massachusetts, well knowing the premises, then and there being such cashier of said The South Danvers National Bank, certain money of said The South Danvers National Bank, to the amount and of the value in all of four thousand dollars, certain funds of said The South Danvers National Bank, to the amount and of the value in all of four thousand dollars, said credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value of four thousand dollars, certain credits of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of four thousand dollars, a certain credit of said The South Danvers National Bank, to the amount and of the value of four thousand dollars, a certain credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value of four thousand dollars, a more particular description of said money, funds, credit and credits being to said jurors unknown, did then and there, to wit, on said twenty-seventh day of November, at said Boston, in said District of Massachusetts, without the knowledge and without the consent of said The South Danvers National Bank, wilfully misapply, by then and there unlawfully, fraudulently, knowingly, wilfully and designedly without the knowledge and without the consent of said The South Danvers National Bank converting said money, funds, credit and credits and each thereof to the use, benefit and advantage of one John W. Dickinson, of Newton, in said District of Massachusetts, thereby depriving said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And so the jurors aforesaid on their oath aforesaid do say and present that said George M. Foster, such cashier as aforesaid, said money, funds, credit and credits, each of the value as aforesaid, of the moneys, funds and credits of said The South Danvers National Bank unlawfully, fraudulently, knowingly, wilfully and de-
23 signedly in manner and form aforesaid on said twenty-seventh day of November, at said Boston, in said District of Massachusetts, did wilfully misapply and convert to the use, benefit and advantage of said John W. Dickinson, and deprive said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And said jurors on their oath aforesaid do further present and say that the said John W. Dickinson, of Newton, in said District of Massachusetts, on said twenty-seventh day of November, at said Boston, in said District of Massachusetts, well knowing the premises, and well knowing that said George M. Foster was then such cashier of said The South Danvers National Bank, did unlawfully, fraudulently, knowingly, wilfully and designedly incite, move, procure,

counsel, hire, command, aid and abet the said Foster, such cashier of said The South Danvers National Bank the said offence and crime of wilfully misapplying the said money, funds, credit and credits of said The South Danvers National Bank, in manner and form and with the intent aforesaid to do and commit, with intent of him, said Dickinson, then and thereby said The South Danvers National Bank to injure and defraud.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for The United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that before and at the time of the commission of the offence hereinafter charged The South Danvers National Bank was duly and legally organized and established as a national banking association under and by virtue of the laws of the United States of America, and was on the day and at the time of the commission of said offence duly and legally existing, located and doing business as such national banking association at Peabody, in the District of Massachusetts; that on the day and at the time of the commission of said offence one George M. Foster was cashier of said The
24 South Danvers National Bank, and as such cashier did assist said The South Danvers National Bank in the transaction of its said banking business.

That said George M. Foster, of Peabody, in the District of Massachusetts, on the seventh day of November, in the year of our Lord one thousand eight hundred and ninety-nine, at said Peabody, in said District of Massachusetts, then and there being such cashier of said The South Danvers National Bank, certain money of said The South Danvers National Bank, to the amount and of the value in all of one thousand five hundred dollars, certain funds of said The South Danvers National Bank, to the amount and of the value in all of one thousand five hundred dollars, certain credits of the said The South Danvers National Bank, to the amount and of the value in all of one thousand five hundred dollars, a more particular description of said money, funds and credits and of the values thereof being to said jurors unknown, did then and there, to wit, on said seventh day of November, at said Peabody, without the knowledge and without the consent of said The South Danvers National Bank, wilfully misapply, by then and there unlawfully, fraudulently, knowingly, wilfully and designedly without the knowledge and without the consent of said The South Danvers National Bank converting said money, funds and credits and each thereof to the use, benefit and advantage of one John W. Dickinson, of Newton, in said District of Massachusetts, thereby depriving said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and

thereby to injure and defraud said The South Danvers National Bank.

And so the jurors aforesaid on their oath aforesaid do say and present that said George M. Foster, such cashier as aforesaid, said money, funds and credits, each of the value as aforesaid, of the moneys, funds and credits of said The South Danvers National Bank unlawfully, fraudulently, knowingly, wilfully and designedly in manner and form aforesaid on said seventh day of November, at said Peabody, in said District of Massachusetts, did wilfully misapply and convert to the use, benefit and advantage of said John W. Dickinson, and deprive said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And said jurors on their oath aforesaid do further present and say that the said John W. Dickinson, of Newton, in said District of Massachusetts, on said seventh day of November, at said Peabody, in said District of Massachusetts, well knowing the premises, and well knowing that said George M. Foster was then such cashier of said The South Danvers National Bank, did unlawfully, fraudulently, knowingly, wilfully and designedly incite, move, procure, counsel, hire, command, aid and abet the said Foster, such cashier of said The South Danvers National Bank, the said offence and crime of wilfully misapplying the said money, funds and credits of said The South Danvers National Bank, in manner and form and with the intent aforesaid to do and commit, with intent of him, said Dickinson, then and thereby said The South Danvers National Bank to injure and defraud.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for The United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that before and at the time of the commission of the offence hereinafter charged The South Danvers National Bank was duly and legally organized and established as a national banking association under and by virtue of the laws of the United States of America, and was on the day and at the time of the commission of said offence duly and legally existing, located and doing business as such national banking association at Peabody, in the District of Massachusetts, and before and at the time of the commission of said offence had an account and credit with The Suffolk National Bank of Boston, a national banking association duly and legally organized and established under and by virtue of said laws, duly and legally existing, located and doing business as such national banking association, at Boston in said District of Massachusetts, and did from

time to time at, before and after the commission of said offence make deposits of moneys, funds and credits to the credit of its said account with said The Suffolk National Bank of Boston, and
26 did at all said times charge its said account for moneys, funds and credits paid and applied by said The Suffolk National Bank of Boston for the use and purposes of said The South Danvers National Bank; that on the day and at the time of the commission of said offence one George M. Foster was cashier of said The South Danvers National Bank, and as such cashier did assist said The South Danvers National Bank in the transaction of its said banking business.

That said George M. Foster, of Peabody, in the District of Massachusetts, on the eleventh day of July, in the year of our Lord one thousand eight hundred and ninety-nine, at Boston, in said District of Massachusetts, well knowing the premises, then and there being such cashier of said The South Danvers National Bank, certain money of said The South Danvers National Bank, to the amount and of the value in all of three thousand two hundred dollars, certain funds of said The South Danvers National Bank, to the amount and of the value in all of three thousand two hundred dollars, said credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value of three thousand two hundred dollars, certain credits of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of three thousand two hundred dollars, a certain credit of said The South Danvers National Bank, to the amount and of the value of three thousand two hundred dollars, a certain credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value of three thousand two hundred dollars, a more particular description of said money, funds, credit and credits being to said jurors unknown, did then and there, to wit, on said eleventh day of July, at said Boston, in said District of Massachusetts, without the knowledge and without the consent of said The South Danvers National Bank, wilfully misapply, by then and there unlawfully, fraudulently, knowingly wilfully and designedly without the knowledge and without the consent of said The South Danvers National Bank converting said money, funds, credit and credits and each thereof to the use, benefit and advantage of one John W. Dickinson, of Newton, in said District of Massachusetts, thereby depriving said The South Danvers National Bank of the same and of the use
27 and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And so the jurors aforesaid on their oath aforesaid do say and present that said George M. Foster, such cashier as aforesaid, said money, funds, credit and credits, each of the value as aforesaid, of the moneys, funds and credits of said The South Danvers National Bank unlawfully, fraudulently, knowingly, wilfully and designedly

in manner and form aforesaid on said eleventh day of July at said Boston, in said District of Massachusetts, did wilfully misapply and convert to the use, benefit and advantage of said John W. Dickinson, and deprive said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And said jurors on their oath aforesaid do further present and say that the said John W. Dickinson, of Newton, in said District of Massachusetts, on said eleventh day of July, at said Boston, in said District of Massachusetts, well knowing the premises, and well knowing that said George M. Foster was then such cashier of said The South Danvers National Bank did unlawfully, fraudulently, knowingly, wilfully and designedly incite, move, procure, counsel, hire, command, aid and abet the said Foster, such cashier of said The South Danvers National Bank, the said offence and crime of wilfully misapplying the said money, funds, credit and credits of said The South Danvers National Bank, in manner and form and with the intent aforesaid to do and commit, with intent of him, said Dickinson, then and thereby said The South Danvers National Bank to injure and defraud.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for The United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that before and at the time of the commission of the offence hereinafter charged The South Danvers National Bank was duly and legally organized and established as a national bank-
28 ing association under and by virtue of the laws of the United States of America, and was on the day and at the time of the commission of said offence duly and legally existing, located and doing business as such national banking association at Peabody, in the District of Massachusetts, and before and at the time of the commission of said offence had an account and credit with The Suffolk National Bank of Boston, a national banking association duly and legally organized and established under and by virtue of said laws, duly and legally existing, located and doing business as such national banking association, at Boston, in said District of Massachusetts, and did from time to time at, before and after the commission of said offence make deposits of moneys, funds and credits to the credit of its said account with said The Suffolk National Bank of Boston, and did at all said times charge its said account for moneys, funds and credits paid and applied by said The Suffolk National Bank of Boston for the use and purposes of said The South Danvers National Bank; that on the day and at the time of the commission of said offence one George M. Foster was cashier of said The South Danvers National Bank, and as such cashier did assist said The South Danvers National Bank in the transaction of its said banking business.

That said George M. Foster, of Peabody, in the District of Massachusetts, on the seventeenth day of January in the year of our Lord one thousand nine hundred, at Boston in said District of Massachusetts, well knowing the premises, then and there being such cashier of said The South Danvers National Bank, certain money of said The South Danvers National Bank, to the amount and of the value in all of one thousand seven hundred and fifty dollars certain funds of said The South Danvers National Bank, to the amount and of the value in all of one thousand seven hundred and fifty dollars said credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of one thousand seven hundred and fifty dollars, certain credits of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of one thousand seven hundred and fifty dollars, a certain credit of said The South Danvers National Bank, to the amount and of the value of one thousand seven hundred and fifty dollars, a certain
29 credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston to the amount and of the value of one thousand seven hundred and fifty dollars, a more particular description of said money, funds, credit and credits being to said jurors unknown, did then and there, to wit, on said seventeenth day of January, at said Boston, in said District of Massachusetts, without the knowledge and without the consent of said The South Danvers National Bank, wilfully misapply, by then and there unlawfully, fraudulently, knowingly, wilfully and designedly without the knowledge and without the consent of said The South Danvers National Bank converting said money, funds, credit and credits and each thereof to the use, benefit and advantage of one John W. Dickinson, of Newton, in said District of Massachusetts, thereby depriving said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And so the jurors aforesaid on their oath aforesaid do say and present that said George M. Foster, such cashier as aforesaid, said money, funds, credit and credits, each of the value as aforesaid, of the moneys, funds and credits of said The South Danvers National Bank unlawfully, fraudulently, knowingly, wilfully and designedly in manner and form aforesaid on said seventeenth day of January, at said Boston, in said District of Massachusetts, did wilfully misapply and convert to the use, benefit and advantage of said John W. Dickinson, and deprive said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And said jurors on their oath aforesaid do further present and say that the said John W. Dickinson, of Newton, in said District of Massachusets, on said seventeenth day of January, at said Boston,

in said District of Massachusetts, well knowing the premises, and well knowing that said George M. Foster was then such cashier of said The South Danvers National Bank did unlawfully, fraudulently, knowingly, wilfully and designedly incite, move, procure, counsel, hire, command, aid and abet the said Foster, such
30 cashier of said The South Danvers National Bank, the said offence and crime of wilfully misapplying the said money, funds, credit and credits of said The South Danvers National Bank, in manner and form and with the intent aforesaid to do and commit, with intent of him, said Dickinson, then and thereby said The South Danvers National Bank to injure and defraud.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for the United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that before and at the time of the commission of the offence hereinafter charged The South Danvers National Bank was duly and legally organized and established as a national banking association under and by virtue of the laws of the United States of America, and was on the day and at the time of the commission of said offence duly and legally existing, located and doing business as such national banking association at Peabody, in the District of Massachusetts, and before and at the time of the commission of said offence had an account and credit with The Suffolk National Bank of Boston, a national banking association duly and legally organized and established under and by virtue of said laws, duly and legally existing, located and doing business as such national banking association, at Boston, in said District of Massachusetts, and did from time to time at, before and after the commission of said offence make deposits of moneys, funds and credits to the credit of its said account with said The Suffolk National Bank of Boston, and did at all said times charge its said account for moneys, funds and credits paid and applied by said The Suffolk National Bank of Boston for the use and purposes of said The South Danvers National Bank; that on the day and at the time of the commission of said offence one George M. Foster was cashier of said The South Danvers National Bank, and as such cashier did assist said The South Danvers National Bank in the transaction of its said banking business.

That said George M. Foster, of Peabody, in the District of Massachusetts, on the twenty-third day of September, in the year of our Lord one thousand eight hundred and ninety-nine, at Boston in
31 said District of Massachusetts, well knowing the premises, then and there being such cashier of said The South Danvers National Bank, certain money of said The South Danvers National Bank, to the amount and of the value in all of four thousand dollars, certain funds of said The South Danvers National Bank, to the amount and of the value in all of four thousand dollars, said credit of said The South Danvers National Bank with said The Suffolk Na-

tional Bank of Boston, to the amount and of the value in all of four thousand dollars, certain credits of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of four thousand dollars, a certain credit of said The South Danvers National Bank, to the amount and of the value of four thousand dollars, a certain credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston to the amount and of the value of four thousand dollars, a more particular description of said money, funds, credit and credits being to said jurors unknown, did then and there, to wit, on said twenty-third day of September, at said Boston, in said District of Massachusetts, without the knowledge and without the consent of said The South Danvers National Bank, wilfully misapply, by then and there unlawfully, fraudulently, knowingly, wilfully and designedly without the knowledge and without the consent of said The South Danvers National Bank converting said money, funds, credit and credits and each thereof to the use, benefit and advantage of one John W. Dickinson, of Newton, in said District of Massachusetts, thereby depriving said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And so the jurors aforesaid on their oath aforesaid do say and present that said George M. Foster, such cashier as aforesaid, said money, funds, credit and credits, each of the value as aforesaid, of the moneys, funds and credits, of said The South Danvers National Bank unlawfully, fraudulently, knowingly, wilfully and designedly in manner and form aforesaid on said twenty-third day of September, at said Boston, in said District of Massachusetts, did wil-
32 fully misapply and convert to the use, benefit and advantage of said John W. Dickinson, and deprive said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And said jurors on their oath aforesaid do further present and say that the said John W. Dickinson, of Newton, in said District of Massachusetts, on said twenty-third day of September, at said Boston, in said District of Massachusetts, well knowing the premises, and well knowing that said George M. Foster was then such cashier of said The South Danvers National Bank did unlawfully, fraudulently, knowingly, wilfully and designedly incite, move, procure, counsel, hire, command, aid and abet the said Foster, such cashier of said The South Danvers National Bank, the said offence and crime of wilfully misapplying the said money, funds, credit and credits of said The South Danvers National Bank, in manner and form and with the intent aforesaid to do and commit, with intent of him, said Dickinson, then and thereby said The South Danvers National Bank to injure and defraud.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for The United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that before and at the time of the commission of the offence hereinafter charged The South Danvers National Bank was duly and legally organized and established as a national banking association under and by virtue of the laws of the United States of America, and was on the day and at the time of the commission of said offence duly and legally existing, located and doing business as such national banking association at Peabody, in the District of Massachusetts: that on the day and at the time of the commission of said offence one George M. Foster was cashier of said The South Danvers National Bank, and as such cashier did assist said The South Danvers National Bank in the transaction of its said banking business.

That said George M. Foster, of Peabody, in the District of
33 Massachusetts, on the twenty-third day of September, in the year of our Lord one thousand eight hundred and ninety-nine, at said Peabody, in said District of Massachusetts, then and there being such cashier of said The South Danvers National Bank, certain money of said The South Danvers National Bank, to the amount and of the value in all of four thousand dollars, certain funds of said The South Danvers National Bank, to the amount and of the value in all of four thousand dollars, certain credits of said The South Danvers National Bank, to the amount and of the value in all of four thousand dollars, a more particular description of said money, funds and credits and of the values thereof being to said jurors unknown, did then and there, to wit, on said twenty-third day of September, at said Peabody, without the knowledge and without the consent of said The South Danvers National Bank, wilfully misapply, by then and there unlawfully, fraudulently, knowingly, wilfully and designedly without the knowledge and without the consent of said The South Danvers National Bank converting said money, funds and credits and each thereof to the use, benefit and advantage of one John W. Dickinson, of Newton, in said District of Massachusetts, thereby depriving said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And so the jurors aforesaid on their oath aforesaid do say and present that said George M. Foster, such cashier as aforesaid, said money, funds and credits, each of the value as aforesaid, of the moneys, funds and credits of said The South Danvers National Bank unlawfully, fraudulently, knowingly, wilfully and designedly in manner and form aforesaid on said twenty-third day of September, at said Peabody, in said District of Massachusetts, did wilfully misapply and convert to the use, benefit and advantage of said John W.

Dickinson, and deprive said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And said jurors on their oath aforesaid do further present and say that the said John W. Dickinson, of Newton, in said District
34 of Massachusetts, on said twenty-third day of September, at said Peabody, in said District of Massachusetts, well knowing the premises, and well knowing that said George M. Foster was then such cashier of said The South Danvers National Bank, did unlawfully, fraudulently, knowingly, wilfully and designedly incite, move, procure, counsel, hire, command, aid and abet the said Foster, such cashier of said The South Danvers National Bank, the said offence and crime of wilfully misapplying the said money, funds and credits of said The South Danvers National Bank, in manner and form and with the intent aforesaid to do and commit, with intent of him, said Dickinson, then and thereby said The South Danvers National Bank to injure and defraud.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

And the jurors aforesaid for the United States of America, within and for the District of Massachusetts, upon their oath aforesaid do further present that before and at the time of the commission of the offence hereinafter charged The South Danvers National Bank was duly and legally organized and established as a national banking association under and by virtue of the laws of the United States of America, and was on the day and at the time of the commission of said offence duly and legally existing, located and doing business as such national banking association at Peabody, in the District of Massachusetts, and before and at the time of the commission of said offence had an account and credit with The Suffolk National Bank of Boston, a national banking association duly and legally organized and established under and by virtue of said laws, duly and legally existing, located and doing business as such national banking association, at Boston, in said District of Massachusetts, and did from time to time at, before and after the commission of said offence make deposits of moneys, funds and credits to the credit of its said account with said The Suffolk National Bank of Boston, and did at all said times charge its said account for moneys, funds and credits paid and applied by said The Suffolk National Bank of Boston for the use and purposes of said The South Danvers National Bank; that on the day and at the time of the commission of said offence one
35 George M. Foster was cashier of said The South Danvers National Bank, and as such cashier did assist said The South Danvers National Bank in the transaction of its said banking business.

That said George M. Foster, of Peabody, in the District of Massachusetts, on the twenty-fourth day of January, in the year of our Lord one thousand nine hundred, at Boston in said District of

Massachusetts, well knowing the premises, then and there being such cashier of said The South Danvers National Bank, certain money of said The South Danvers National Bank, to the amount and of the value in all of one thousand seven hundred and twenty-one dollars and fifty cents, certain funds of said The South Danvers National Bank, to the amount and of the value in all of one thousand seven hundred and twenty-one dollars and fifty cents, said credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of one thousand seven hundred and twenty-one dollars and fifty cents, certain credits of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of one thousand seven hundred and twenty-one dollars and fifty cents, a certain credit of said The South Danvers National Bank, to the amount and of the value of one thousand seven hundred and twenty-one dollars and fifty cents, a certain credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston to the amount and of the value of one thousand seven hundred and twenty-one dollars and fifty cents, a more particular description of said money, funds, credit and credits being to said jurors unknown, did then and there, to wit, on said twenty-fourth day of January, at said Boston, in said District of Massachusetts, without the knowledge and without the consent of said The South Danvers National Bank, wilfully misapply, by then and there unlawfully, fraudulently, knowingly, wilfully and designedly without the knowledge and without the consent of said The South Danvers National Bank converting said money, funds, credit and credits and each thereof to the use, benefit and advantage of one John W. Dickinson, of Newton, in said District of Massachusetts, thereby depriving said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M.
36 Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And so the jurors aforesaid on their oath aforesaid do say and present that said George M. Foster, such cashier as aforesaid, said money, funds, credit and credits, each of the value as aforesaid, of the moneys, funds and credits of said The South Danvers National Bank unlawfully, fraudulently, knowingly, wilfully and designedly in manner and form aforesaid on said twenty-fourth day of January, at said Boston, in said District of Massachusetts, did wilfully misapply and convert to the use, benefit and advantage of said John W. Dickinson, and deprive said The South Danvers National Bank of the same and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank.

And said jurors on their oath aforesaid do further present and say that the said John W. Dickinson, of Newton, in said District of Massachusetts, on said twenty-fourth day of January, at said Boston, in said District of Massachusetts, well knowing the premises,

and well knowing that said George M. Foster was then such cashier of said The South Danvers National Bank did unlawfully, fraudulently, knowingly, wilfully and designedly incite, move, procure, counsel, hire, command, aid and abet the said Foster, such cashier of said The South Danvers National Bank, the said offence and crime of wilfully misapplying the said money, funds, credit and credits of said The South Danvers National Bank, in manner and form and with the intent aforesaid to do and commit, with intent of him, said Dickinson, then and thereby said The South Danvers National Bank to injure and defraud.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

This indictment was found at the December Term, A. D. 1900, of this court, and thence was continued to the March Term, A. D. 1901, when on the twenty-second day of March, 1901, the following Demurrer was filed, viz:—

37 *Demurrer of John W. Dickinson.*

And now, before plea, comes the said John W. Dickinson named in said indictment in his own proper person into court, and, having heard the said indictment read and not confessing to be true any of the matters and things in the same or in any of the several counts thereof set forth, demurs thereto and to each and every count thereof, and says that the said indictment and each and every count thereof and the matters and things in the same and in the several counts thereof contained and set forth and in the manner and form as the same are therein and in the several counts thereof stated and set forth is and are not sufficient in law, and that he, the said John W. Dickinson, is not bound by the law of the land to answer thereunto, and this he, the said John W. Dickinson, is ready to verify; and for cause and causes of his said demurrer to said indictment and to each and every count thereof he, the said John W. Dickinson, shows that the said indictment and each and every count thereof is bad, because:—

First: The said indictment does not, nor does any one of the several counts thereof, set forth with clearness and with that reasonable certainty required by law the offence and offences with which he, the said John W. Dickinson, stands charged.

Second: The said indictment and each and every one of the several counts thereof is uncertain and vague, and lacks the certainty and particularity to which the said defendant John W. Dickinson is by law entitled, to inform him as to the charge or charges against him, and to enable him to prepare his defence and duly protect him by any judgment which might be rendered upon said indictment or upon any of the several counts thereof.

Third: The said indictment does not, nor does any one of the several counts thereof, contain and set forth, as required by law, the elements of the offence or offences intended to be charged against him, the said John W. Dickinson, and sufficiently apprise him, the said John W. Dickinson, of what he must be prepared to meet at a trial upon said indictment, and by reason of such insufficiency of said indictment and of each of the several counts thereof, the record of a trial thereon of him, the said John W. Dickinson, would
38 not show with accuracy, as is required by law, to what extent he might plead a former acquittal or conviction in case of any other proceedings against him for similar offence or offences.

Fourth: The said indictment does not, nor does any one of the several counts thereof, apprise him, the said John W. Dickinson, as is required by law, of the nature of the accusation or accusations against him, and of the offence or offences with which he stands charged, with that reasonable certainty required by law to enable him, the said John W. Dickinson, to prepare his defence and to plead any judgment that might be obtained thereon or upon any of the several counts thereof as a bar to any subsequent prosecution against him, the said John W. Dickinson.

Fifth: The said indictment does not, and no count thereof does, state with sufficient definiteness and apprise him, the said John W. Dickinson, with that reasonable certainty required by law, what were the matters and things and property which the said defendant George M. Foster stands charged with having wilfully misapplied by an unlawful and fraudulent conversion thereof to the use, benefit and advantage of him, the said John W. Dickinson, and which he, the said John W. Dickinson, stands charged with having aided and abetted the said Foster to wilfully misapply in the manner and form aforesaid.

Sixth: Each and every one of the several counts of the said indictment charges two or more independent offences, contrary to law.

Seventh: The said indictment and each and every count thereof charges that the said defendant George M. Foster did wilfully misapply divers (but to him, the said John W. Dickinson, unknown) matters and things by unlawfully and fraudulently converting the same to the use, benefit and advantage of him, the said John W. Dickinson, and that he, the said John W. Dickinson, did unlawfully and fraudulently aid and abet the said George M. Foster to do and commit the said offence or offences of wilfully misapplying such matters and things in the manner and form aforesaid; but the said indictment does not, nor does any one of the several counts thereof, contain, as required by law, averment or averments to show how such alleged misapplication or misapplications was or were made, and that it or they or any of them was or were unlawfully
39 within the meaning of Section 5209 of the Revised Statutes of the United States.

Eighth: The said indictment, and each and every count thereof, charges that the said defendant George M. Foster did wilfully misapply divers (but to him, the said John W. Dickinson, unknown) matters and things by unlawfully and fradulently converting the same to the use, benefit and advantage of him, the said John W. Dickinson, and that he, the said John W. Dickinson, did unlawfully and fraudulently aid and abet the said George M. Foster to do and commit the said offence or offences of wilfully misapplying such matters and things in the manner and form aforesaid; but the words "did wilfully misapply" do not of themselves fully and clearly set forth, as is required by law, every element of the offence or offences charged against the said George M. Foster, and do not of themselves fully and clearly set forth, as is required by law, every element of the offence or offences which he, the said John W. Dickinson, stands charged with having aided and abetted the said George M. Foster to do and commit.

Ninth: The said indictment and each and every count thereof charges that the said defendant George M. Foster did wilfully misapply divers (but to him, the said John W. Dickinson, unknown) matters and things by unlawfully and fraudulently converting the same to the use, benefit and advantage of him, the said John W. Dickinson, and that he, the said John W. Dickinson, did aid and abet the said George M. Foster to do and commit the said offence or offences of wilfully misapplying such matters and things in the manner and form aforesaid: but the said indictment and each and every count thereof fails to specify, as is required by law, the particulars of the said George M. Foster's application and applications of such matters and things, so as to distinguish the application and applications charged in the said indictment and in the several counts thereof as wilful and criminal misapplication and misapplications from other application and applications of such matters and things that might be lawful or that might be unlawful but not criminal within the meaning of Section 5209 of the Revised Statutes of the United States.

Tenth: The said indictment and each and every count
40 thereof charges that the said defendant George M. Foster did wilfully misapply divers (but to him, the said John W. Dickinson, unknown) matters and things by unlawfully and fraudulently converting the same to the use, benefit and advantage of him, the said John W. Dickinson, and that he, the said John W. Dickinson, did aid and abet the said George M. Foster to do and commit the said offence or offences of wilfully misapplying such matters and things in the manner and form aforesaid; but the words "wilfully misapply" are not sufficiently descriptive of the exact offence or offences intended to be charged against the said defendant George M. Foster, and not sufficiently descriptive of the exact offence or offences which he, the said John W. Dickinson, stands charged with having aided and abetted the said George M. Foster to do and commit, without fur-

ther averments showing how much alleged misapplication or misapplications was or were made, and that it or they was or were unlawful within the meaning of Section 5209 of the Revised Statutes of the United States.

Eleventh: The said indictment and the several counts thereof seek to charge him, the said John W. Dickinson, with aiding and abetting an officer of a national bank in wilfully misapplying the funds of said bank, but do not, as is required by law, state facts showing a misapplication of the funds of such bank by such officer in such a manner as to constitute a criminal offence under the provisions of Section 5209 of the Revised Statutes of the United States.

Twelfth: The said indictment does not, nor does any one of the several counts thereof, charge any offence against the said defendant George M. Foster with that reasonable certainty required by law, and does not charge with that reasonable certainty required by law the commission of any offence by said defendant George M. Foster in the doing or commission of which he, the said John W. Dickinson, abetted, as charged in the said indictment and in the several counts thereof.

Wherefore, for want of a sufficient indictment in this behalf, he, the said John W. Dickinson, prays judgment of said indictment and of each and every count thereof, and that by this Honorable
41 Court he may be hence dismissed and discharged from the said premises in said indictment and in each and every count thereof specified.

JOHN W. DICKINSON,
FRANK PAUL, *Counsel.*

On the twenty-third day of March, 1901, the following joinder on demurrer was filed, viz:

Joinder on demurrer.

And Boyd B. Jones, who prosecutes for the United States in this behalf, says that the said indictment and each count thereof and the matters therein contained in manner and form as the same are therein set forth, are sufficient in law to compel the said John W. Dickinson to answer to the same and each count thereof, as well as said George M. Foster, and that the said Boyd B. Jones, who prosecutes as aforesaid, is ready to verify and prove the same as the court here shall direct and award. Wherefore, inasmuch as the said John W. Dickinson hath not answered to said indictment, nor hitherto in any manner denied the same, that he be compelled to answer to the charges therein contained and in each count thereof.

BOYD B. JONES,
United States Attorney for said District.

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On the twenty-third day of March, 1901, the following Additional Demurrer was filed, viz:

Additional demurrer of John W. Dickinson.

And the said John W. Dickinson named in said indictment, in his own proper person coming into court within the time to him allowed by said court for filing his objections, if any, to the said indictment, here assigns the following additional cause or causes or grounds for his demurrer to the said indictment and to each and every one of the several counts thereof, and the said cause or causes and grounds being in addition to those by him heretofore assigned thereto on the twenty-second day of March, 1901, and being as follows:

Thirteenth: The said indictment and each and every one of the several counts thereof is bad, because the said indictment does
42 not, nor does any one of the several counts thereof, state and set forth with such certainty and particularity as to satisfy the requirements of the Sixth Amendment of the Constitution of the United States the offence or offences with which he, the said John W. Dickinson, stands charged, and which he stands charged with having aided and abetted the said defendant George M. Foster to do and commit.

Fourteenth: The said indictment and each and every one of the several counts thereof is bad, because the said indictment is not, nor is any one of the several counts thereof, sufficiently explicit in its allegations to satisfy the requirements of the Sixth Amendment to the Constitution of the United States, by which a person accused of a crime is entitled to be informed of the nature and cause of the accusation.

JOHN W. DICKINSON,
FRANK PAUL, *Counsel.*

On the twenty-third day of March, 1901, the following Joinder on Demurrers was filed, viz:

Joinder on demurrers.

And Boyd B. Jones, who prosecutes for the United States in this behalf, says that the said indictment and each count thereof, and the matters therein contained in manner and form as the same are therein set forth, are sufficient in law to compel the said John W. Dickinson to answer to the same and each count thereof, as well as said George M. Foster, and that the said Boyd B. Jones, who prosecutes as aforesaid, is ready to verify and prove the same as the court here shall direct and award. Wherefore, inasmuch as the said John W. Dickinson hath not answered to said indictment, nor hitherto in any manner denied the same, that he be compelled to answer to the charges therein contained and in each count thereof.

BOYD B. JONES,
United States Attorney for the said District.

From said March Term, A. D. 1901, this indictment was continued to the June Term, A. D. 1901, when on the twenty-first day of August, 1901, the demurrers heretofore filed having been heard, it was ordered by the court that said demurrers be overruled.

43 On the twenty-third day of August, 1901, the time for filing exceptions to overruling of demurrers was extended to August 30, in accordance with an agreement of parties that day filed.

On the thirtieth day of August, 1901, the said defendant George M. Foster was set to the bar and had said indictment read to him, and for plea he said that thereof he was not guilty.

On the thirtieth day of August, 1901, the time for filing exceptions to overruling of demurrers of defendant John W. Dickinson was extended to and including September 10, 1901.

From said June term, A. D. 1901, this indictment was continued to the September term, A. D. 1901, when on the tenth day of September, 1901, the said defendant John W. Dickinson was set to the bar and had said indictment read to him, and for plea he said that thereof he was not guilty.

On the tenth day of September, 1901, the following application for severance of trial was filed, viz:

Application of John W. Dickinson for a severance of trial.

And now comes the said John W. Dickinson in his own proper person into court, and, not waiving but insisting upon his exceptions to the overruling of his demurrer to the said indictment, and insisting as to each and every count thereof that it is not sufficiently certain, particular and explicit in its allegations and substance to satisfy, and that no count of said indictment does satisfy, the requirements of the sixth amendment to the Constitution of the United States, by which he, a person accused of a crime, is entitled to be informed of the nature and cause of the accusation against him, prays this honorable court that the trial of these said two defendants be separated, and that he, the said John W. Dickinson, one of the said defendants,

44 be not put upon his trial of the said indictment jointly with the said defendant George M. Foster, but be permitted to go to trial upon said indictment alone, and for the following reasons and upon the following grounds, namely:—

First: Because he, the said defendant John W. Dickinson, was not, at the time and times of the alleged commission of the offences alleged in the different counts of the said indictment, an officer of said The South Danvers National Bank, while, on the contrary, the said defendant George M. Foster was at such time and times a director and the cashier of such bank.

Second: Because he believes and has reason to believe that the defence of him, the said John W. Dickinson, is antagonistic to the defence of his co-defendant, George M. Foster.

Third: Because he believes and has reason to believe that upon a joint trial of the said indictment he, the said John W. Dickinson, would be prejudiced by the reception of evidence which would not be admissible as against him, the said John W. Dickinson, while competent as against his said co-defendant George M. Foster.

Fourth: Because he believes and has reason to believe that evidence will necessarily be admitted in the prosecution or defence of his said co-defendant George M. Foster, which, though inadmissible on the trial of him, the said John W. Dickinson, alone, will, if he be required to go to trial jointly with the said George M. Foster, unavoidably reach the ears of the jury and to the fatal prejudice of him, the said John W. Dickinson, and notwithstanding all instructions of the court to the jury to disregard such evidence as against him, the said John W. Dickinson, by reason whereof he, the said John W. Dickinson, will not have a fair and impartial trial.

Fifth: Because he believes and has reason to believe that upon a joint trial of him, the said John W. Dickinson, with his co-defendant, George M. Foster, any evidence of wrong-doing, if any there was, upon the part of his co-defendant, George M. Foster, in his offices of director and cashier of said The South Danvers National Bank, would so prejudice the jury that any participation, however innocent, of him, the said John W. Dickinson, in any wrongful acts, if any there were, of the said George M. Foster would subject him, the said John W. Dickinson, to the danger of being convicted of having aided and abetted the said George M. Foster in the doing of such wrongful acts, even though wholly innocent of any wrongful intent in connection therewith.

JOHN W. DICKINSON,
FRANK PAUL, *Counsel.*

BOSTON, *September 10, 1901.*

COMMONWEALTH OF MASSACHUSETTS, SUFFOLK, *ss:*

Then personally appeared the above-named John W. Dickinson and, as to the matters and things stated as reasons and grounds for his application for a separate trial of the joint indictment against him and his codefendant, George M. Foster, made oath that the same, so far as they are stated to be facts, are true; and that, so far as the same are stated as matters of belief, he believes and has reason to believe them to be true.

T. PUTNAM SYMONDS,
Justice of the Peace.

On the twelfth day of November, 1901, the application of John W. Dickinson for severance of trial was denied by the court.

From said September term, A. D. 1901, this indictment was continued to the December term, A. D. 1901, when on the seventh day

of January, 1902, a jury was duly impanelled and sworn to try the issue, videlicet, Philander A. Angier, foreman, and fellows, videlicet, Clarence E. Ainsworth, John A. Bean, George E. Blake, Samuel L. Colby, William A. Connolly, Henry L. Denhem, Michael J. Driscoll, Henry A. Dwier, Charles W. Hawkins, John T. Johnson and John E. Keith.

On the twenty-eighth day of January, 1902, Michael J. Driscoll, one of the jurors impanelled in this case, having been found in contempt of court, it was ordered that the case be taken from the jury, and all jurors except said Driscoll were discharged.

[Memorandum: For contempt proceedings In re Driscoll, see Court Record, vol. 98, page 714, or No. 232, on the criminal docket of this court.]

From said December term, A. D. 1901, this indictment was continued from term to term to the December term, A. D. 1902, when on the second day of January, 1903, the following application for severance of trial was filed, viz:

46 *Application of John W. Dickinson for a severance of trial.*

And now comes the said John W. Dickinson in his own proper person into court, and not waiving but insisting upon his exceptions to the overruling of his demurrer to the said indictment, and insisting as to each and every count thereof that it is not sufficiently certain, particular and explicit in its allegations and substance to satisfy, and that no count of said indictment does satisfy, the requirements of the sixth amendment to the Constitution of the United States, by which he, a person accused of a crime, is entitled to be informed of the nature and cause of the accusation against him, prays this honorable court that the trial of these said two defendants be separated, and that he, the said John W. Dickinson, one of the said defendants, be not put upon his trial of the said indictment jointly with the said defendant George M. Foster, but be permitted to go to trial upon said indictment alone, and for the following reasons and upon the following grounds, namely:

First: Because he, the said defendant John W. Dickinson, was not, at the time and times of the alleged commission of the offences alleged in the different counts of the said indictment, an officer of said The South Danvers National Bank, while, on the contrary, the said defendant George M. Foster was at such time and times a director and the cashier of such bank.

Second: Because he believes and has reason to believe that the defence of him, the said John W. Dickinson, is antagonistic to the defence of his co-defendant, George M. Foster.

Third: Because he believes and has reason to believe that upon a joint trial of the said indictment he, the said John W. Dickinson, will be prejudiced by the reception of evidence which would not be

admissible as against him, the said John W. Dickinson, while competent as against his said co-defendant, George M. Foster. And he avers that upon a joint trial of himself and of the said George M. Foster upon said indictment heretofore begun before this honorable court, in January, 1902, and which trial was not completed because of the misconduct of one of the jurors, he was so prejudiced, in that evidence was admitted which was ruled not to be evidence as
47 against him, the said John W. Dickinson, but competent as against his said co-defendant, George M. Foster.

Fourth: Because he believes and has reason to believe that evidence will necessarily be admitted in the prosecution or defence of his said codefendant, George M. Foster, which, though inadmissible on the trial of him, the said John W. Dickinson, alone, will, if he be required to go to trial jointly with the said George M. Foster, unavoidably reach the ears of the jury and to the fatal prejudice of him, the said John W. Dickinson, and notwithstanding all instructions of the court to the jury to disregard such evidence as against him, the said John W. Dickinson, by reason whereof he, the said John W. Dickinson, will not have a fair and impartial trial. And he avers that upon a joint trial of himself and the said George M. Foster upon said indictment heretofore begun before this honorable court in January, 1902, and which trial was not completed because of the misconduct of one of the jurors, he did not have a fair and impartial trial, so far as the same proceeded, because he was greatly prejudiced by reason of evidence which, although it may have been admissible as against his said co-defendant, was not and was ruled not to be admissible as against him, the said John W. Dickinson, and such prejudice of him, the said John W. Dickinson, would not have been fairly remedied by instructions of the court to disregard such evidence as against him, the said John W. Dickinson.

Fifth: Because he believes and has reason to believe that upon a joint trial of him, the said John W. Dickinson, with his co-defendant, George M. Foster, any evidence of wrongdoing, if any there was, upon the part of his co-defendant, George M. Foster, in his offices of director and cashier of said The South Danvers National Bank, would so prejudice the jury that any participation, however innocent, of him, the said John W. Dickinson, in any wrongful acts, if any there were, of the said George M. Foster, would subject him, the said John W. Dickinson, to the danger of being convicted of having aided and abetted the said George M. Foster in the doing of such wrongful acts even though wholly innocent of any wrongful intent in connection therewith.

Sixth: Because he believes and has reason to believe and avers that, in disregard of his constitutional rights, a joint trial of
48 him and of the said Foster is an unfair proceeding and one tending to deprive him of his right to be tried upon evidence legally competent as against him and further tending to the danger of his conviction upon evidence not legally competent as against him; and that the purpose of a joint trial can be only to add to any

evidence of wrongdoing that there may be against him, the said Dickinson, the weight of any evidence that there may be of any wrongdoing upon the part of the said Foster.

JOHN W. DICKINSON,
FRANK PAUL, *Counsel.*

COMMONWEALTH OF MASSACHUSETTS, SUFFOLK, *ss:*

BOSTON, *January 2, 1903.*

Then personally appeared the above-named John W. Dickinson and, as to the matters and things stated as reasons and grounds for his application for a separate trial of the joint indictment against him and his co-defendant, George M. Foster, made oath that the same, so far as they are stated to be facts, are true; and that, so far as the same are stated as matters of belief, he believes and has reason to believe them to be true.

WALTER A. THORPE,
Justice of the Peace.

On the sixth day of January, 1903, the application of John W. Dickinson for severance of trial was denied by the court.

On the fourteenth day of January, 1903, a jury was duly impanelled and sworn to try the issue, videlicet, Charles F. Low, foreman, and fellows, videlicet, John F. Perry, J. Frank Pope, Thomas Queen, George E. Salley, Edward E. Stockman, Martin V. B. Stone, Edward E. Chadwick, Joseph F. Crowell, Arthur C. Currier, Winslow Finney and Matthew L. Greene.

On the twenty-seventh day of January, 1903, the following was filed:

Whereas one of the jurors impanelled to try the above-entitled indictment is unable by reason of illness to further sit therein,

Now, therefore, we consent and agree that the said juror, to wit, Charles F. Low, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before
49 the remaining eleven jurors with the same force and effect as if said juror had not been discharged.

JOHN W. DICKINSON.
GEORGE M. FOSTER.

UNITED STATES,
By BOYD B. JONES,
Special Assistant U. S. Attorney.

And thereupon the court proceeded with the trial of the issue with the remaining eleven jurors and appointed as foreman Martin V. B. Stone.

On the eighteenth day of March, 1903, the following was filed:

Whereas one of the jurors impanelled to try the above-entitled indictment is unable by reason of a death in his family to further sit therein.

Now, therefore, we consent and agree that the said juror, to wit, Edward E. Stockman, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining ten jurors with the same force and effect as if said juror had not been discharged.

JOHN W. DICKINSON.
GEORGE M. FOSTER.
BOYD B. JONES,
Special Assistant U. S. Attorney.

And thereupon the court proceeded with the trial of the issue with the remaining ten jurors.

On the nineteenth day of March, 1903, this cause was committed to a jury, who, after hearing all matters and things concerning the same, returned the following verdict:

The verdict of jury on the 1st count is as to defendant Foster, guilty; as to defendant Dickinson, guilty; 2d count is as to defendant Foster, not guilty; as to defendant Dickinson, not guilty; 3d count is as to defendant Foster, guilty; as to defendant Dickinson, guilty; 4th count is as to defendant Foster, disagree; as to defendant Dickinson, disagree; 5th count is as to defendant Foster, disa-
50 gree; as to defendant Dickinson, disagree; 6th count is as to defendant Foster, not guilty; as to defendant Dickinson, not guilty; 7th count is as to defendant Foster, not guilty; as to defendant Dickinson, not guilty; 8th count is as to defendant Foster, disagree; as to defendant Dickinson, disagree; 9th count is as to defendant Foster, disagree; as to defendant Dickinson, disagree; 10th count is as to defendant Foster, not guilty; as to defendant Dickinson, not guilty; 11th count is as to defendant Foster, disagree; as to defendant Dickinson, disagree; 12th count is as to defendant Foster, not guilty; as to defendant Dickinson, not guilty; 13th count is as to defendant Foster, not guilty; as to defendant Dickinson, not guilty; 14th count is as to defendant Foster, not guilty; as to defendant Dickinson, not guilty; 15th count is as to defendant Foster, guilty; as to defendant Dickinson, guilty.

Given in open court this twentieth day of March, A. D. 1903.

From the March Term, nineteen hundred and three, this indictment was continued from term to term to the September Term, nineteen hundred and three, when, on the third day of October, nineteen hundred and three, the following motion to Substitute Bill of Exceptions and Substituted Bill of Exceptions of defendant Dickinson to the overruling of his demurrer was filed:

Motion to Substitute Bill of Exceptions and Substituted Bill of Exceptions.

And now comes the defendant John W. Dickinson and moves the court that the bill of exceptions filed by him in this cause on the ninth day of September, 1901, be stricken from the files, and that

the following Bill of Exceptions be substituted therefor and settled and allowed:

Bill of Exceptions.

Be it remembered that on the twenty-first day of August, 1901, the demurrer of the defendant John W. Dickinson to the indictment having been overruled, the said defendant duly excepted to the order of the court overruling the said demurrer, and the said defendant's exceptions were duly allowed.

51 And the said John W. Dickinson presents this bill of exceptions to the court and prays that the same may be signed by the court and allowed and made a part of the record in this cause.

Respectfully submitted,

JOHN W. DICKINSON.

Allowed August 10, 1906.

FREDERIC DODGE,
Judge United States District Court.

From said September term, nineteen hundred and three, this indictment was continued from term to term to the March term, nineteen hundred and five, when, on the twenty-third day of March, nineteen hundred and five, the following motion of the defendant John W. Dickinson in arrest of judgment was filed:

Motion of the defendant John W. Dickinson in arrest of judgment.

And now, after verdict against the said John W. Dickinson, and before sentence, comes the said John W. Dickinson, by his attorneys, and moves the court here to arrest judgment herein and not pronounce the same, because of manifest errors in the record appearing, to wit: Because the said verdict against the said John W. Dickinson was found by a so-called jury consisting of ten (10) jurors only, and not by a jury of twelve (12) jurors, as required by the Constitution and laws of the United States, and because no judgment against him, the said John W. Dickinson, can be lawfully rendered on said verdict.

POWERS & HALL,
Attorneys for the said Defendant.

From said March term, 1905, this indictment was continued from term to term to this present June term, when, on the tenth day of August, 1906, the following answer of the United States to the motion of said defendant John W. Dickinson for arrest of judgment is filed:

52 *Answer of the United States to the motion of said defendant John W. Dickinson for arrest of judgment.*

And now comes John H. Casey, special assistant United States attorney for the District of Massachusetts, who appears to oppose the granting of said motion, and assigns as reasons why said motion should not be granted the following:

On the fourteenth day of January, 1903, the defendants were put upon trial before a jury of twelve men, and the trial continued until

the twenty-seventh day of January, 1903. On that day it was found that Charles F. Low, one of the jurors impanelled in the case, was unable by reason of illness to sit further thereon. Whereupon a conference was had between the trial judge, the counsel for the United States, the counsel for the defendants and the defendants themselves, and it was agreed by and between all of said parties, and requested by the defendants, that the trial should proceed before the remaining eleven jurors, and the following stipulation, signed by both defendants personally, was then filed in the case and appears as a part of the record, that is to say:

"Whereas one of the jurors impanelled to try the above-entitled indictment is unable by reason of illness to further sit therein,

"Now, therefore, we consent and agree that the said juror, to wit, Charles F. Low, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining eleven jurors with the same force and effect as if said juror had not been discharged.

JOHN W. DICKINSON.
GEORGE M. FOSTER.
UNITED STATES,
by BOYD B. JONES,
Special Assistant U. S. Attorney.

And thereupon the court proceeded with the trial of the issue with the remaining eleven jurors until the eighteenth day of March, 1903. On that day Edward E. Stockman, one of the remaining eleven jurors impanelled in the case, requested to be excused from sitting further thereon on account of the death of his father. Whereupon a conference was had between the court and counsel and both
53 defendants, and it was agreed, and the defendants requested, that the trial should proceed before the remaining ten jurors, and the following stipulation, also signed by the defendants personally, was filed in the case on said eighteenth day of March, and appears as a part of the record and is as follows:

"Whereas one of the jurors impanelled to try the above-entitled indictment is unable, by reason of a death in his family, to further sit therein,

"Now, therefore, we consent and agree that the said juror, to wit, Edward E. Stockman, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining ten jurors with the same force and effect as if said juror had not been discharged.

JOHN W. DICKINSON.
GEORGE M. FOSTER.
BOYD B. JONES.
Special Assistant U. S. Attorney.

And thereupon the said juror, Edward E. Stockman, was discharged by the court in the presence and hearing of both defendants,

and without objection from the defendants or either of them. The trial of the indictment continued with the remaining ten jurors.

On March 19, 1903, the cause was committed to the jury. On the following day the jury returned their verdict, in which they found both defendants guilty of the first, third and fifteenth counts, and not guilty on the second, sixth, seventh, tenth, twelfth, thirteenth and fourteenth counts, and disagreed on the fourth, fifth, eighth, ninth and eleventh counts. Said cause was committed to said jury in the presence and hearing of both defendants without objection, and the verdict was returned in the presence and hearing of both defendants without objection.

And further said attorney says that the term of said court at which said trial was had and at which said verdict was rendered expired, as more fully appears by the record in said case, before said motion for arrest of judgment was filed.

Wherefore, and because of the foregoing, said attorney prays that the motion of the defendant said John W. Dickinson be denied.

UNITED STATES OF AMERICA,
By JOHN H. CASEY,
Special Assistant United States Attorney.

54 On said tenth day of August, nineteen hundred and six, the motion of defendant John W. Dickinson in arrest of judgment is overruled by the court.

On said tenth day of August, nineteen hundred and six, the following bill of exceptions of the defendant John W. Dickinson to the order of the court overruling his motion in arrest of judgment is filed and allowed by the court:

Bill of exceptions of the defendant John W. Dickinson to the order of the court overruling his motion in arrest of judgment.

Be it remembered that on the tenth day of August, 1906, the motion of the defendant John W. Dickinson in arrest of judgment having been overruled, the said defendant duly excepted to the order of the court overruling his said motion, and his exception was duly allowed.

And the said John W. Dickinson presents this bill of exceptions to the court and prays that the same may be signed by the court and allowed and made a part of the record in this cause.

JOHN W. DICKINSON.

Allowed, August 10, 1906.

FREDERIC DODGE,
Judge United States District Court.

On said tenth day of August, nineteen hundred and six, the following bill of exceptions of defendant John W. Dickinson is filed, and said defendant Dickinson being present, it is ordered by the court that said bill of exceptions be substituted for the bill of exceptions

which had heretofore, to wit, on the twenty-seventh day of July, nineteen hundred and three, been filed, which last-named bill of exceptions is omitted from this record:

Bill of exceptions of the defendant John W. Dickinson with reference to matters arising at the trial.

George M. Foster and John W. Dickinson were indicted at the December Term (A. D. 1900) of the U. S. District Court in a single indictment which charged in fifteen counts that the said George
55 M. Foster, being the cashier of the South Danvers National Bank, had wilfully misapplied the money, funds and credits of said bank, and that the said John W. Dickinson had aided and abetted the said George M. Foster in such misapplications. The said indictment appears in the record of this case and is made part hereof.

Both the defendants pleaded not guilty.

On the fourteenth day of January, 1903, the defendants were put upon trial and the trial continued until March 19, 1903, when the cause was committed to the jury. On the following day the jury returned their verdict in which they found both defendants guilty on the first, third and fifteenth counts. On the second, sixth, seventh, tenth, twelfth, thirteenth and fourteenth counts the jury found both defendants not guilty. On the fourth, fifth, eighth, ninth, and eleventh counts the jury disagreed.

It appeared at the trial that the thirteenth and fourteenth counts of the indictment related to the same transaction and were intended to charge the same offence in different form. All the other counts referred to separate transactions, and there were, therefore, fourteen separate offences charged to have been committed from June 10, 1899, to May 14, 1900, inclusive.

Expressed as briefly as possible without any attempt at this point to state the Government's contention in full, the specific act relied on as a misapplication of funds and credits under each count, except the second, thirteenth and fourteenth, was the withdrawal of the bank's funds, moneys and credits by the payment of a check drawn on the bank by the defendant Dickinson when Dickinson's account at the bank was not sufficient to meet the check; the Government contending that the payments were made by the defendant Foster, or by his instructions, that both defendants acted in concert and in each instance with illegal intent and that to cover the overdrafts Dickinson gave and Foster discounted notes which both knew were worthless, and the proceeds of which were credited to Dickinson's account before the checks were charged to his account on the ledger. The transactions on which the second and the thirteenth and fourteenth counts were based were more complicated and need not be described at this point.

There follows below a statement of ch of the evidence as
56 is deemed material for the purposes of this bill of exceptions. Where evidence was offered and admitted under a particular

count or particular counts of the indictment, that fact appears in the statement of the evidence below. The remainder of the evidence included in this statement was offered and admitted without any limitation to a particular count or particular counts.

At an early point in the trial the court gave the jury a general instruction as follows:

"And the jury may be cautioned now once for all. Both Mr. Foster and Mr. Dickinson are on trial. Certain testimony may be introduced which may bear upon the question of the guilt of both; certain testimony may be introduced—I don't say it has been—bearing on the guilt of Mr. Dickinson alone; and certain testimony may be introduced bearing on the guilt of Mr. Foster alone; and the jury will bear in mind that what is evidence against Mr. Dickinson is not evidence against Mr. Foster, and *vice versa*, unless some connection is shown."

This caution was frequently repeated during the trial in substantially similar language and a similar instruction was included in the final charge to the jury. Wherever, aside from these general instructions, particular evidence was offered or admitted for or against one of the defendants only, and wherever the jury was specifically instructed to consider particular evidence only in connection with one of the defendants, those facts appear in the course of the statement of the evidence below. The remainder of the evidence included in the statement was offered and admitted and left to the jury without being limited to the case of either of the defendants, except as it may have been limited by the general instructions above referred to; but whenever requested, the court instructed the jury that they were not to consider the evidence against Dickinson unless connected with him.

Statement of Evidence.

THE SOUTH DANVERS NATIONAL BANK.

The South Danvers National Bank was a duly organized national bank during all the time referred to in the indictment and during all the time referred to in such of the evidence as relates to the said bank.

The bank was located in the town of Peabody, Massachusetts,
57 which was formerly known as South Danvers, and had done business there since the early sixties. The capital stock was $150,000. The bank suspended September 19, 1900. (The cause of the suspension was not in issue.)

The defendant George M. Foster had been in the employ of the bank as clerk, bookkeeper and cashier since February, 1868, when he was nineteen years old. He became the cashier in 1882, continuing as such until the suspension of the bank. He was made one of the directors of the bank in 1897 and continued as such up to the time of the suspension.

About 1886 William P. Clark became the president of the bank and continued as such until the suspension. During the period covered by the various counts of the indictment the directors were: William P. Clark, Horace Bushby, Albert H. Whidden, Henry G. Rice, E. A. Poole and the defendant George M. Foster. Mr. Bushby became a director in 1880 or 1881; Mr. Poole came next to Mr. Clark and Mr. Bushby in length of service; Mr. Rice became a director in 1888 or 1889; Mr. Whidden in January, 1897. All these persons continued to be directors until the suspension of the bank.

THE DEFENDANT DICKINSON.

The defendant John W. Dickinson testified regarding his early history and his general business as follows:

He was born in 1860, in Turin, New York. Until he was twelve years old he lived on a farm, and at the age of thirteen left home to work for his living. After working at various trades and occupations until he was about eighteen years old he went to work for a mercantile house in Chicago, then for a commission house, and then in 1882 or 1883 came to Boston and went into the employ of Claflin, Larabee & Company, dealers in hosiery, gloves and underwear. In the fall of 1892, having been a junior partner in the concern during the preceding three or four years, he left this business. During his entire connection with Claflin, Larabee & Company, he had traveled for the firm, and in 1892 he had accumulated about twenty thousand dollars' worth of property.

He then became a notebroker and engaged also in the business of selling bonds, securities, etc., and continued in these lines of
58 business down to the time of this trial. At first he was associated with his brother, W. P. Dickinson, of Chicago, in a partnership under the name of W. P. Dickinson & Company. This firm had its central office in Chicago, and the defendant Dickinson opened a branch office in Boston. The firm, among other things, organized and financed various corporations, including the Bankers National Bank of Chicago, with a capital of one million dollars ($1,000,000), and the Masonic Temple Safety Deposit Vault Company, capitalized for two hundred thousand dollars ($200,000), with one hundred thousand dollars ($100,000) in bonds. The latter company was a prosperous going concern at the time of the trial. In connection with the Safety Deposit Vault Company, the firm of W. P. Dickinson & Company organized the company and sold the stock and bonds on commission. They also had a contract with the company to put in the safe-work and received certain of the securities for that work, which was done by the Diebold Safe and Lock Company, under contract with W. P. Dickinson & Company. The firm also sold a large amount of the stock of the corporation owning the Masonic Building, in Chicago, which was a separate enterprise from the Safety Deposit

Vault Company, and was capitalized at two million dollars ($2,000,000). The same firm financed the Concord Apartment House Company, in Chicago, which erected a building costing $350,000 above ground, and which was bonded for one hundred and fifty thousand dollars ($150,000), the firm furnishing money to erect the building and receiving securities of the company in return. The firm also financed certain water and lighting companies by taking their bonds and placing them so as to furnish money for the enterprises. Among these companies were the Rock Rapids Water Company, of Rock Rapids, Iowa. The Grand Junction Water Company, of Grand Junction, Colorado, the Carlinville Water Company, the Pontiac Water, Light and Power Company, of Pontiac, Illinois, and the Franklin Light and Power Company, of Franklin, Indiana. The largest of these enterprises involved something like one hundred thousand dollars ($100,000) of bonds. The firm handled the bonds of one or two water companies in Maine.

In the note brokerage business the firm sometimes bought notes outright, making its profit by placing them again at a lower
59 rate of discount, and sometimes got them discounted elsewhere on commission. The defendant Dickinson began to do a note brokerage business as a member of the firm of W. P. Dickinson & Company in 1893. As a member of the firm, the defendant Dickinson placed notes at various Boston banks, including the North American, Howard, Shawmut, Commonwealth and others; at various Salem banks, including the First National, Asiatic and National Exchange, and at various banks on Cape Cod, including the First National Bank of Provincetown.

DICKINSON'S RELATIONS WITH THE SOUTH DANVERS BANK.

Frank Taylor, a witness for the Government, who had been bookkeeper for the bank during the period covered by the counts of the indictment and who had been in the employ of the bank since January 1, 1886, having been bookkeeper since 1888, testified on cross examination that Mr. Dickinson made his first personal appearance at the South Danvers Bank in company with other notebrokers, it being the custom for notebrokers to visit the bank for the purpose of selling notes. He had no recollection of when this visit was, but should say from certain memoranda that it was in 1895. He remembered seeing Mr. Dickinson come to the bank with Mr. Clark at various times. He thought this was in 1897 or 1898; it was before Dickinson opened an account at the bank. In 1895, 1896, 1897, he knew the bank discounted notes which came from Mr. Dickinson. These notes were sometimes brought to the bank by Mr. Clark, the president, and sometimes they came to the bank by mail. He did not know whether any were brought by Mr. Foster. During this period and up to 1898, when Dickinson opened an account at the bank, he was paid for these notes by cashier's check. The notes bought from

Dickinson, whether notes made or indorsed by him or notes of other makers which he handled merely as broker, were known at the bank as "Dickinson Paper."

Mr. Bushby, a witness for the Government, who had been a director of the bank since 1880 or 1881, testified on cross examination that he first met Dickinson in 1896 or 1897, at a directors' meeting at the bank, where Dickinson came with other notebrokers.

Mr. Dickinson testified that he made the acquaintance of Mr.
60 Clark, the president of the South Danvers National Bank, in the year 1893, and that he first sold notes to the bank a short time afterwards. Mr. Clark was in the habit of coming to Boston twice a week and the first notes were given to him, taken by him to the bank and payment made to Mr. Dickinson by money or cashier's check brought by Clark to Dickinson. For a period of two years or so Dickinson continued to transact business with the bank in the same way through Clark, sometimes seeing Clark in person and sometimes transacting the business by mail. After making the acquaintance of Mr. Clark he used to meet him on the average about once a week on business and social occasions. In 1897 and early in 1898 he transacted some of the business directly with the bank by means of letters addressed to the bank, or to the cashier, enclosing notes which he desired the bank to discount.

He also testified that in 1894, 1895, 1896 and 1897, he visited the bank from three or four to half dozen times a year. He first met Mr. Foster personally, he thought, sometime early in 1898, being introduced to him at the bank by Mr. Clark. On cross examination being shown two letters, one dated 1896, and one dated 1898, addressed to Foster referring to business matters, he testified that he might have met Mr. Foster personally before 1898.

Mr. Dickinson further testified that the paper which he placed at the bank during that period he very seldom indorsed. In about twenty per cent of the instances he gave, at the request of Mr. Clark, a special guaranty on a separate piece of paper. There were some instances, during that period, of notes which Mr. Dickinson had placed with the bank and which were not paid at maturity by the makers. In such cases he usually took care of the notes, either paying them in cash or giving other notes in place of them. In some of these cases he learned from the makers before maturity that the notes would not be paid. In a few cases where the customers were out of town he did not learn before maturity that the notes would not be taken care of and the paper was protested, and he was then notified by the South Danvers Bank. In some cases where Mr. Dickinson knew that the paper would not be paid he allowed it to go to protest in order to hold the indorsers and then proceeded to take care of it. There were some cases where notes had been
61 sent to the Suffolk Bank in Boston for collection and were not paid at maturity in which the South Danvers Bank recalled such notes from the Suffolk Bank and held them until Mr. Dickinson

took care of them. This did not happen often, as the bank did not like to recall such notes.

Mr. Dickinson also testified that of the notes which he had discounted at the bank previous to April, 1898, some were his own notes and some were made by other individuals or concerns; of the latter, some he had purchased outright and some he had placed on commission.

It appeared from the evidence of both Mr. Taylor and Mr. Dickinson that Dickinson had discounted at the South Danvers Bank during this period considerable paper of the following persons:

J. K. Souther & Sons, brewers.
George H. Fera, a retired confectioner.
P. W. Elliott, treasurer of the Highland Foundry.
U. K. Mayo, a Boston dentist.
Edwin W. Gay, a stationer doing business under the name of Aaron R. Gay & Company.
S. A. F. Whipple, who was in the laundry business in Boston.
Oatman Brothers, owners of a number of creameries in Illinois, Wisconsin and Minnesota.
H. L. Burgett, a railroad contractor, of Boston.
Harry W. Bates, who was in the clock business in Chelsea.
A. C. Simpson, who was in a fibre company.
G. A. Phippen, secretary of the Old Colony Trust Company.
B. K. Moore, a lawyer, and secretary of the Home Market Club.
Daniel Pratt & Sons, who were in the clock business.
D. M. Dillon, a Fitchburg boilermaker.
C. A. Cunningham, a manufacturer's agent for hardware in Boston.
Charles E. Davis, a Boston optician.
James Stevenson, in the real estate business.
Walter S. Brewer, a Boston tailor.
Penacook Manufacturing Company, a New Hampshire corporation, manufacturing plumbers' woodwork.
Henry B. McDowell, son of Major-General McDowell, and engaged in business of various kinds.
George H. Morrill, one of the firm of A. Stowell & Company, jewellers.
Sarah J. Fitz, widow of Eustace C. Fitz, of Chelsea, who had been in the hardware business.
The Highland Foundry Company of Boston.
F. W. Gregory, in the oil business in Boston.
Louis H. Schneider, a Boston insurance agent.

62 Mr. Dickinson opened an account at the South Danvers National Bank as a depositor in April, 1898. At that time the bank held notes which had been placed there by him to the amount of $43,185.16.

The following list prepared by counsel for the defendant Foster, and at his request verified from the books of the bank by Mr. Taylor,

shows the makers and amounts of such notes, their maturity, the indorsers, and whether or not they were collateral notes. Those which are marked "J. W. Dickinson, (Gr)," were accompanied by such special guaranties as have been mentioned:

65 Maker.	Face.	Security, indorsers, etc.	Maturity.
W. P. Dickinson & Co.	$4,000.	Coll.	May 12–98
John W. Dickinson	1,000.		Demand—
George H. Morrill	300.	J. W. Dickinson (Gr)	May 10–98
Penacook Mfg. Co	2,000.	P. J Baker and J. Champion	Aug. 10–98
Highland Foundry Co	1,000.	W. H. Towne and P. W. Elliott	Sept. 7–98
C. E. Davis	5,000.	Lillian Davis	Apr. 1–98
		J. W. Dickinson (Gr)	
David H. Fitch	5,000.	Coll. and J. W. Dickinson	June 21–98
John W. Dickinson	2,000.	Coll.	July 2–98
Carl Findeison	2,500.	J. L. Clark & Coll.	Aug. 26–98
John W. Dickinson	3,000.		Demand—
Alfred H. Blackmer	500.	Coll.	July 11–98
Charles C. Price	100.		Aug. 18–98
Edward H. Mower	750.	Coll.	June 1–98
S. A. F. Whipple	500.	A. C. Simpson	June 27–98
Penacook Mfg. Co	2,000.	P. J. Baker	July 11–98
John W. Dickinson	2,000.	Coll.	May 17–98
Mary F. Davis	300.	J. W. Dickinson, Gr.	July 5–98
George W. Elliott	650.	W. H. Towne & Coll.	July 20–98
Roscoran W. Pillsbury	226.35	J. W. Dickinson (Gr)	Apr. 30–98
W. P. Dickinson & Co.	1,200.	Coll.	May 3–98
Edwin W. Gay	2,000.	Coll.	May 7 & 9–98
John W. Dickinson	2,000.	Coll.	July 27–98
Josephine A. DeRosay	510.	Coll.	Apr. 18–98
64 Louis A. Schneider	200.	J. W. Dickinson (Gr)	Apr. 22–98
Louis A. Schneider	388.81	J. W. Dickinson (Gr)	Apr. 25–98
Henry B. McDowell	2,000.	J. W. Dickinson & Coll.	Apr. 25–98
Highland Foundry Co	2,000.	W. H. Towne & P. W. Elliott	Apr. 13–98
Frederick W. Gregory	2,000.	H. B. McDowell (Gr)	
		J. W. Dickinson, End.	May 24–98
Geo. H. Fera	800.	J. W. Dickinson	Apr. 8–98
F. W. Gregory	800.	Coll.	Apr. 10–98
	$43,185.16		

65 Regarding the opening by Mr. Dickinson of an account at the bank as depositor, in April, 1898, and the general course of business between Mr. Dickinson and the bank after Mr. Dickinson opened such account, Mr. Taylor testified as follows:

To the best of his recollection this account was opened by crediting to Mr. Dickinson, as a deposit, the proceeds of certain notes brought to the bank by Mr. Clark and discounted. Mr. Dickinson did not visit the bank often after opening his account. He sent notes down to be discounted and notes which were accepted were credited to his account. He also gave the bank, on a separate piece of paper, dated May 8, 1898, a general guaranty of all notes which he might put in at the bank. (This guaranty was put in evidence by the Government.)

Taylor further testified that notes put in the bank by Mr. Dickinson, like other notes held by the bank, were customarily sent for collection, when due, to the Suffolk Bank, in Boston, the correspondent of the South Danvers Bank, with which the South Danvers Bank had credit during the period covered by the indictment. After he gave his general guaranty, notes which were unpaid were charged to his account. Mr. Dickinson would frequently take care of such notes by paying them at the Suffolk Bank by checks drawn on the

South Danvers Bank, and sending to the South Danvers Bank renewals of such notes which would be discounted and credited to his account.

Mr. Dickinson had a pass book which went back and forth between him and the bank. It was not posted up regularly, however, and lay in the bank sometimes for two months or more, and was sometimes held by Dickinson for several months.

Mr. Dickinson's account seldom showed a large balance and was frequently overdrawn. His checks came in the clearing house letter from Boston, and were paid by a general cashier's check to the clearing house. This clearing house check was usually made out by the witness Taylor, but it was sometimes made out by Mr. Foster or by Mr. Dodge, a clerk in the bank. Mr. Dickinson's overdraft checks were so paid in accordance with general instructions from Mr. Foster, the cashier, accompanied by Foster's oral state-
66 ments to Mr. Taylor that Mr. Dickinson would send down funds to take care of the checks.

A number of times when his account was overdrawn, drafts were drawn by Mr. Foster, as cashier, in favor of the bank, on Mr. Dickinson, payable at the Suffolk Bank, for amounts varying from $3000 to $6000, which were credited to Dickinson's account when drawn, and if not paid, as sometimes happened, were charged back to his account.

Regarding the foregoing matters Mr. Dickinson testified as follows:

In April, 1898, at the suggestion of President Clark, he opened an account at the bank. He sent to the bank, usually by mail, notes which he wished to have discounted, and such notes as were accepted were placed to the credit of his account. For the first few months he was notified by the bank pretty regularly as to the notes which the bank discounted, but after that the bank in many instances did not notify him, but every now and then when he saw Mr. Clark he received word about notes which had been sent down.

He further testified that deposits made by him, other than the proceeds of notes discounted, were sometimes sent by mail and were sometimes deposited by him at the Suffolk Bank, in Boston, which was the correspondent of the South Danvers Bank, to be credited to the South Danvers Bank. He did not visit the bank so often after his account was opened as before.

His general guaranty of May 8, 1898, was given to the bank at the suggestion of President Clark. Dickinson testified that Mr. Clark said that it would give the directors confidence, and they would discount any paper he offered if he would stand back of it.

When notes placed at the bank by him were sent to Boston for collection, and he learned that the maker would not take care of the note at maturity, he frequently arranged with the president of the South Danvers Bank to discount a renewal of the note and then drew a check on the South Danvers Bank to pay the note, sending down a

newal immediately afterwards, which was discounted at the South Danvers Bank and credited to his account.

His pass book went and came from the bank usually by mail, but in certain instance it was carried by Mr. Dodge, Mr. Clark, or
67 Mr. Dickinson himself. During 1898 it went back and forth from the bank pretty regularly—perhaps every month or six weeks; after that it came irregularly—about once every two or three months.

He further testified that on several occasions when there was an overdraft, the South Danvers Bank drew drafts upon Mr. Dickinson, running from $3000 to $7000 in amount, which he accepted whenever he was in town. They were all payable at the Suffolk Bank, and when he paid them he paid them by certified check on the Shawmut Bank to the credit of the South Danvers Bank. At various times Mr. Dickinson was notified by Mr. Foster or one of the other employés of the bank that his account was overdrawn, and in such cases he sometimes sent them deposits, and frequently, when not in funds, sent down notes made by himself or by one of his customers to be discounted and credited to his account.

Prior to 1899 he kept no records of notes which he had discounted at the bank for himself or his customers, except such references to notes as were contained in his letter-press copies of his letters to the bank inclosing notes. In 1899, after he had had some dispute with the president and cashier as to notes for which he thought he had not received credit, he began to keep a record of such notes in a book.

He further testified that there were several instances, in 1899, when he disputed his accounts with Mr. Clark and Mr. Foster, or both, Mr. Dickinson saying in one instance that he had not been credited with notes discounted by him, and in another that he had been charged with notes for which he was not responsible; that Mr. Clark in one case, and Mr. Foster in another, agreed to look into the matter and rectify the account if there was any mistake.

CONDUCT OF BUSINESS AT THE BANK.

The persons employed in the bank during the period covered by the counts of the indictment were Mr. Foster, the cashier, Frank Taylor, the bookkeeper, and Mr. Dodge, the clerk. Mr. Taylor had been in the employ of the bank since January 1, 1886.

The bank was connected with the Boston Clearing House, and received every morning a letter from the clearing house containing the checks on the South Danvers Bank presented at banks
68 belonging to the clearing house on the previous day. The first business done in the morning usually consisted in opening the clearing house letter, entering it in the journal and making out a cashier's check to the manager of the clearing house for the amount due from the bank to the clearing house. This was done by either one of the three persons in the bank who happened to get around to

it first. It was done oftenest by Taylor, sometimes by Dodge, and occasionally by Foster.

Among the books of the bank were the journal and the book of balances, called in the case, for brevity, the ledger. The clearing house letter was entered in the journal, the entry showing the bank at which each of the checks received had been presented for payment, the name of the drawer, the amount of each check and the total of all the checks. An entry was then added, indicating that a check drawn on the Boston correspondent of the South Danvers Bank had been sent to the clearing house. The ledger showed every day, as to each of the depositors of the bank, the balance to his credit in the morning, the charges and credit to his account during the day and the balance to his credit at night. When, instead of a credit balance, there was an overdraft, the amount of such overdraft appeared on the ledger in red ink. This book was posted up towards the close of business every day. It was kept almost entirely by Mr. Taylor.

The cash drawer of the bank was used to hold the currency, the checks on the South Danvers Bank which had not yet been entered on the books, or had been entered in the journal, but not in the ledger, checks on other banks, and notes that were discounted. Currency and checks in the cash drawer were all carried on the books as cash. While Foster, Taylor and Dodge all made more or less use of the cash drawer, it was principally in charge of Mr. Dodge.

The books of the bank were all introduced in evidence and used by both parties at the trial.

THE FOURTEEN SPECIFIC TRANSACTIONS COMPLAINED OF IN THE INDICTMENT.

The Government called as a witness the bookkeeper, Frank Taylor, and through his testimony and the books of the bank showed
69 the specific transactions complained of under the various counts as misapplications of the funds of the bank. This evidence was undisputed, except where the contrary appears below, and was substantially as follows:—

Under the first, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth and fifteenth counts, the transactions complained of were of the same general character. In each instance it appeared that on a certain date there came into the bank in the clearing house letter a check drawn by Mr. Dickinson on the South Danvers bank; that Mr. Dickinson's account in the ledger that morning showed a small credit balance not sufficient to meet the check; that the check was duly entered in the journal with the other checks received from the clearing house; and that the amount of Mr. Dickinson's check was included in the check sent to the clearing house; that Mr. Dickinson's check was not posted to his account in the ledger when the ledger accounts were made up on that day, and his ledger account showed no overdraft that night; that his check was carried in the

drawer as cash until some subsequent day, when his account showed, by reason of notes discounted and credited to it or otherwise, a sufficient balance to meet it, and was entered against him in the ledger by Mr. Taylor.

Mr. Taylor testified that these checks were so honored and dealt with in accordance with Mr. Foster's instructions, such instructions being accompanied by oral statements of Foster that Mr. Dickinson would send down funds to take care of the checks, and that Mr. Foster did not like to have red ink entries appear upon the books. The payment of these checks, when Mr. Dickinson had not sufficient funds at the bank to meet them, constituted the specific transactions complained of as misapplications in the above counts of the indictment.

Under the fifth and seventh counts the evidence was similar, except that in each case it appeared that notes were sent by Mr. Dickinson to the bank in the course of the day on which the check came in and was paid; that these notes were discounted and the proceeds credited to Mr. Dickinson's account, and the check was posted into the ledger on the same day, the ledger account showing no overdraft that night. The payment of these checks constituted the specific transactions complained of as misapplications in the fifth and seventh counts.

Under the third count, which was the latest in date, the evi-
70 dence was the same as under the counts first mentioned above, except that on the morning of that day Mr. Dickinson's account in the ledger showed an overdraft, and the check was posted to the ledger on the same day, the ledger account showing an increased overdraft at night. It appeared in another part of Mr. Taylor's testimony that shortly after March 24, 1900, Mr. Foster instructed Mr. Taylor that in future Mr. Dickinson's checks were to be entered against him in the ledger on the day they came in. Mr. Taylor testified that there was no change in Foster's instructions to him as to honoring Mr. Dickinson's overdrafts. On March 28, 1900, Mr. Dickinson's account showed at night an overdraft of $2,258.19, and from that time until May 14 there appeared in the ledger a continual and increasing overdraft. The payment of Mr. Dickinson's check when his account was already largely overdrawn was the transaction complained of as a misapplication in the third count.

It appeared in the course of the trial that no funds of the bank were paid to Mr. Dickinson or to anybody for his benefit in connection with the transactions referred to in the thirteenth and fourteenth and second counts. On motion of the Government's attorney the court therefore directed the jury to find both defendants not guilty on the thirteenth, fourteenth and second counts.

On the first, third and fifteenth counts both defendants were found guilty.

On the sixth, seventh, tenth and twelfth counts both defendants were found not guilty.

On the fourth, fifth, eighth, ninth and eleventh counts the jury disagreed as to both defendants.

The following table shows the dates of the various counts, the amounts of the checks whose payment was charged as a misapplication, the payees of such checks, by whom such checks were entered in the journal, the standing of Mr. Dickinson's ledger balances in the morning and at night on the days when such checks came in and were paid, and the dates on which the checks were posted to Mr. Dickinson's account in the ledger. This table is made up from Mr. Taylor's testimony and the entries in the books at the bank, which were put in evidence. The counts on which the defendants were found guilty are indicated, for convenience of reference, by underscoring.

Count.	Date	Dickinson check rec'd & paid.	Payee.	By whom entered in journal.	Ledger bal. a. m.	Ledger bal. p. m.	Check entered in ledger.
4	June 10, 1899	$4,000	Nat. Shawmut Bank.	Taylor..	$581.14	$626.54	June 13, 1899
5	June 13, 1899	$4,500	Nat. Shawmut Bank.	Foster..	$326.54	$63.36	Same day.
11	July 11, 1899	$3,200	Nat. Shawmut Bank.	Taylor..	$746.21	$283.68	Sept. 1, 1899
13 & 14	Sept. 23, 1899	(See statement above.)					
10	Nov. 7, 1899	$1,800	Nat. Hamilton Bank.	Taylor..	$129.79	$451.73	Nov. 10, 1899
9	Nov. 27, 1899	$4,000	Nat. Hamilton Bank.	Foster..	$80.05	$147.13	Feb. 1, 1900
8	Nov. 28, 1899	$4,500	Nat. Hamilton Bank.	Podge..	$147.13	$1,391.99	Jan. 30, 1900
6	Dec. 16, 1899	$2,500	Nat. Hamilton Bank.	Taylor..	$53.13	$53.13	Feb. 15, 1900
12	Jan. 17, 1900	$1,750	Nat. Hamilton Bank.	Taylor..	$135.35	$135.35	Feb. 13, 1900
15	Jan. 24, 1900	$1,721.50	C. A. Hopkins.....	Taylor..	$10.35	$44.10	Feb. 17, 1900
7	Feb. 21, 1900	$2,500	Nat. Hamilton Bank.	Taylor..	$46.34	$6.78	Same day.
1	Mar. 19, 1900	$3,537.92	Nat. Hamilton Bank.	Taylor..	$8.63	$104.63	Mar. 24, 1900
2	Mar. 24, 1900	(See statement above.)					
3	May 14, 1900	$2,488	Hill & Cutler.....	Taylor.	Overdraft. $10,888.57	Overdraft. $13,754.40	Same day.

72 In addition to the evidence stated above under the eleventh count, it appeared in evidence under that count that on the morning of July 11, when the check for $3,200 came into the bank, there were already in the bank and being carried in the cash drawer as cash two checks of Mr. Dickinson's in favor of the National Shawmut Bank, one for $2,000, which had come in July 1, and one for $1,900, which had come in July 7, both of which had been paid when they came in by the usual cashier's check to the clearing house. Neither of these checks had been posted to Mr. Dickinson's account in the ledger.

The dates and amounts charged in the indictment agreed with the dates and amounts proved in evidence, as shown by the above table, except under the sixth and tenth counts.

Exception 1: The sixth count alleged a misapplication of $2,500 on February 15, 1900. At the trial the Government proposed to show that the misapplication charged in the sixth count was a misapplication of $2,500 on December 16, 1899, and the evidence stated above under that count, together with other evidence as to the same transaction, was admitted by the court. The defendant, by his counsel, duly and seasonably objected to the reception of the evidence thus offered, on the ground that no misapplication on December 16 was

charged in the indictment, and that it would have been impossible for the defendant or any other person to determine from the indictment that the transaction which the Government offered to prove, or any transaction on December 16, was intended to be charged; and on the ground that the reception of this evidence would involve a material and improper variance between the indictment and the proof. The court ruled that the Government might show under this count a misapplication of $2,500 on December 16, 1899, and the defendant, Dickinson, by his counsel, duly excepted and his exception was duly noted. The Government then proceeded to introduce the evidence summarized above under the sixth count; and also in the course of the trial, for the purpose of sustaining the charge in that count, introduced other evidence relating to the transaction of December 16, 1899. The defendant, Dickinson, by his counsel, duly and seasonably excepted to the admission of each and every sepa-
73 rate portion of this evidence, and, his objection being overruled by the court, duly and seasonably excepted and his exceptions were duly noted.

Exception 2: The tenth count of the indictment charged a misapplication of $1,500 on November 7, 1899. Under that count the Government introduced evidence, as appears above, showing the payment of a check of Mr. Dickinson's drawn on the South Danvers Bank for $1,800 on November 7, Mr. Dickinson's ledger balance that morning being only $129.79. The defendant Dickinson, by his counsel, duly and seasonably objected to the reception of this evidence, on the ground that it involved a material and improper variance between the indictment and the proof, and that it was impossible to tell from the indictment that this transaction was the transaction referred to in the tenth count, and on the ground that the Government could not prove under that count a misapplication of a larger sum than was alleged in the indictment. His objection was overruled, and he by his counsel duly and seasonably excepted to each and every separate portion of the evidence under this count, and his exceptions were duly noted.

At a former trial of the defendants under the same indictment, substantially the same evidence was introduced by the Government under the sixth and tenth counts, against the objections and exceptions of the defendants.

It appeared on the cross-examination of the Government's witness, Frank Taylor, that the defendant Foster, as cashier of the bank, signed in blank from time to time some 25 or 50 cashier's checks of the South Danvers Bank, in order that the body of such checks might be filled in afterwards by other employees of the bank as the checks were required in the business of the bank, in Mr. Foster's absence, or when he was occupied with other matters. The cashier's checks, which were sent to the clearing house on the dates of the various counts of the indictment (except the second, thirteenth, and

fourteenth counts), were put in evidence under the respective counts by the Government. These checks were shown to the witness Taylor, and he testified as to the handwriting of the body of each check. It appeared by this testimony that the check connected with the ninth count was in Mr. Foster's handwriting; those connected with the first, third, fourth, fifth, sixth, seventh, tenth, eleventh,
74 twelfth, and fifteenth counts were in Mr. Taylor's handwriting; that connected with the eighth count was in Mr. Dodge's handwriting. All were signed by Mr. Foster.

The defendants, Foster and Dickinson, testified in their own behalf, and were cross-examined by the Government.

Under each count of the indictment Mr. Dickinson testified that at the time of drawing of the check, the payment of which was the transaction referred to in the indictment as a misapplication, he did not know exactly what his balance at the bank was, but did not think it sufficient for the check in question. In each case he testified that he had no intention of injuring or defrauding the bank or deceiving the directors.

Mr. Foster testified under each count, except the fifteenth, that he did not know that the check in question was to be drawn until after it reached the bank.

Both defendants testified that there was no arrangement or understanding whatever between them by which Mr. Dickinson was to be allowed to overdraw his account.

Mr. Dickinson testified that he had no knowledge whatever that any of his checks were ever carried in the cash drawer, and supposed, until he was preparing for trial, that all his checks had been regularly posted to his account in the ledger when they came into the bank.

In connection with each of the counts except the second, thirteenth, and fourteenth Mr. Dickinson testified that his checks on the South Danvers Bank above referred to under the respective counts were drawn to provide funds for the payment of certain notes, drafts, etc., which he specified in each case, and which he testified in each case that he did in fact pay with the funds so realized. The purposes for which he testified that these funds were obtained and used may be classified as follows:

First: The payment of notes previously placed by him at the South Danvers Bank and sent by that bank to Boston for collection, a renewal of the note in each instance being discounted by the South Danvers Bank immediately afterwards. Mr. Dickinson testified that there was nothing unusual in his using this method of renewing notes; that he had done it at other banks. In several of these
75 instances he testified that he had specifically arranged with Mr. Clark for renewal of the note before drawing on the South Danvers Bank.

Second: The same purpose as that just described, except that instead of a renewal of the same note a new note of another maker for substantially the same amount was by previous agreement between Mr. Dickinson and Mr. Clark, president of the South Danvers Bank, discounted by that bank.

Third: The payment of a note previously placed by Mr. Dickinson at the South Danvers Bank and sent to Boston for collection, Mr. Dickinson paying the South Danvers Bank within a few days afterwards the amount of the note.

Fourth: The payment of a note previously placed by Dickinson at some other bank and sent to Boston for collection, a renewal of the note being immediately afterwards discounted at the South Danvers Bank and credited to Mr. Dickinson's account, in accordance with a previous arrangement with Mr. Clark. In these instances Mr. Dickinson testified that he was specifically authorized to draw on the South Danvers Bank for payment for the notes in question.

Fifth: The payment of drafts drawn by Mr. Foster as cashier of the South Danvers Bank on Mr. Dickinson when his account was overdrawn, and accepted by him when he had not sufficient funds in hand for their payment.

Sixth: The payment of notes of the Norfolk Manufacturing Company discounted by banks other than the South Danvers Bank and falling due when the Norfolk Company was not in funds to take care of them, and the banks to which they belonged were not willing to renew them. In this connection Mr. Dickinson testified that at some time previous to June, 1899, he had a conversation with Mr. Clark as to the Norfolk Manufacturing Company, in which Mr. Clark said to him that the South Danvers Bank held some of the company's paper; that he thought the bank had enough of this paper; that he would rather the company borrowed more of the money they wanted elsewhere and took some of their paper out of the South Danvers Bank.

[It was undisputed that Henry G. Rice, one of the directors
76 of the South Danvers Bank, was president of the Norfolk Manufacturing Company, and that the father of Taylor, the bookkeeper, was treasurer, and that Mr. Rice had placed some paper of the company with the South Danvers Bank.]

Mr. Dickinson testified that he and Mr. Clark discussed a statement which Mr. Rice had given the South Danvers Bank in regard to the condition of the Norfolk Manufacturing Company, and that Mr. Clark said he thought it was a correct statement; that Mr. Rice was a capable business man; and that he (Mr. Clark) thought they were gaining in the business. After this conversation Mr. Dickinson testified that he placed notes of the Norfolk Manufacturing Company at various banks, including the Shawmut, the Commonwealth, and some country banks. He placed none at the South

Danvers Bank. The Norfolk Company had an arrangement with him whereby he took care of their paper when in funds, or got it renewed. He took care of some of their paper under this arrangement without reference to the South Danvers Bank. In each instance in which he drew on the South Danvers Bank for the payment of such notes Mr. Dickinson testified that before doing so he had a talk with Mr. Clark in which he told Mr. Clark that he himself was not in a position to take care of the notes, and pointed out that if they went to protest it might make trouble for the Norfolk Company and result in loss to the South Danvers Bank, because that bank held a good deal of the Norfolk Company's paper. In each instance Mr. Dickinson testified that he told Mr. Clark he thought he could place the notes elsewhere in a short time, and that in each instance Mr. Clark said he did not wish the notes to go to protest and authorized Mr. Dickinson to draw on the South Danvers Bank for the money necessary to pay the notes, Dickinson agreeing to repay it as soon as he could place the notes elsewhere.

Seventh: The payment of a loan which Mr. Dickinson had obtained from the Hamilton Bank. In this connection Mr. Dickinson testified that the president of the Hamilton Bank had told him that one of the directors objected to renewing Mr. Dickinson's personal loan at the bank because he did not like the collateral. Mr. Dickinson testified that he told Mr. Clark about this and asked Mr. Clark if he might draw on the South Danvers Bank for five or six hundred
77 dollars to help pay off this loan, to which he testified Mr. Clark agreed.

Eighth: The payment of an insurance premium. In this connection Dickinson testified that, knowing that this premium was about to fall due, he told Mr. Clark that he might not have money enough to pay it, and asked him if he would let him have for a short time money enough to make up the amount; that Mr. Clark asked the size of the policy, and Mr. Dickinson told him $50,000; that Mr. Clark said if Mr. Dickinson wanted the money for only a few days he would let him have it, and asked him to draw for as little as possible; that this conversation was repeated by Mr. Dickinson to Mr. Foster. The check was drawn payable to the insurance agent.

Mr. Dickinson testified that his checks on the South Danvers Bank involved under the fourth and fifth counts were drawn to provide funds for the first, fourth, fifth, and sixth of the purposes above enumerated; under the eleventh count for the first purpose (except that in this instance the note had been placed at the South Danvers Bank by someone else, and Mr. Dickinson had been requested to take care of it) and for the sixth purpose; under the tenth, sixth and twelfth counts for the first purpose; under the eighth and ninth counts for the first, third, and fifth purposes; under the fifteenth count for the eighth purpose; under the seventh count for the second

purpose; under the first count for the fourth and seventh purposes; under the third count for the first and sixth purposes.

Various checks of Mr. Dickinson drawn on the Shawmut and Hamilton banks, agreeing in dates, amounts, and payees with the above testimony, and various notes and drafts tending to corroborate the above, were introduced by or in behalf of the defendant, Dickinson. His testimony as to notes held by the South Danvers Bank falling due and as to renewals or other notes being discounted by the South Danvers Bank was corroborated by the books of the bank.

Mr. Foster testified in regard to the above transactions that whenever one of Mr. Dickinson's overdraft checks came into the bank when he was there he called up Mr. Dickinson in the afternoon and asked for funds; and that in each case Dickinson said he would
78 send down notes or funds; that as regards the check for $1,721.50 paid January 24, 1900, which formed the basis of the charge in the fifteenth count, he noticed that it was payable to an insurance company or agent and spoke to Mr. Clark about it saying, "Here is an insurance check of Mr. Dickinson," and adding that Mr. Dickinson had said he carried $100,000 of life insurance, and that Mr. Clark replied, "We had better pay it," and accordingly he paid it; that as regards the seventh count, he was not in the bank on February 21, when the check for $2,500, which formed the basis of the charge in that case, was paid, and knew nothing of the transaction on that day until he returned to the bank some time later.

It appeared in various ways in the course of the trial that there were a number of instances in 1899 and 1900 besides those which formed the basis of the charges in the indictment, in which checks drawn by Mr. Dickinson on the South Danvers Bank came into the bank through the clearing house on days when the payment of such checks would result in an overdraft. So far as appeared, up to March 26, 1900, such checks were uniformly dealt with in the manner described above under the various counts of the indictment. Mr. Taylor testified in his direct examination that to the best of his recollection this method of dealing with Mr. Dickinson's overdrafts began in 1898.

Under the eleventh, ninth, eighth, sixth, twelfth, fifteenth, seventh, and third counts it appeared in each case that in addition to the check whose payment was complained of as a misapplication, another check or other checks drawn by Mr. Dickinson on the South Danvers Bank came into the bank in the same clearing house letter. So far as appeared, these other checks were duly entered in both journal and ledger on the day they came in. There was no direct evidence tending to show that in deciding which checks to enter in the ledger on that day and which to carry in the drawer, Mr. Foster or the other employés at the bank were guided by any other matter or circumstance than the size of the checks.

79 NOTES DISCOUNTED ON DAYS WHEN CHECKS WERE ENTERED IN LEDGER.

Under each count of the indictment separately, except the third count, the Government introduced evidence as to what funds were received from Mr. Dickinson and credited to his account at the South Danvers Bank on the days when the checks whose payment was complained of in the respective counts were entered in the ledger.

Under the fourth, eleventh, tenth, ninth, eighth, sixth, twelfth, fifteenth and first counts this evidence was substantially similar. Under each of these counts it appeared, as above stated, that a check of Mr. Dickinson's was honored by the bank when his account in the ledger did not show a balance sufficient to meet the check, and that such check was duly entered in the journal, but was carried in the cash drawer as cash until a subsequent day, when Mr. Dickinson's account showed a sufficient balance to meet it, and was then for the first time posted to the ledger. Under each of these counts separately the Government went on to show, by the testimony of the bookkeeper Taylor, and by the books of the bank, that on the day when the check in question was posted to the ledger Mr. Dickinson's account in the ledger showed in the morning a small balance, not equal to the amount of the check, and that on that day there were credits to his account equal to or greater than the amount of the check, so that after the check had been posted to the ledger the ledger account showed a credit balance at night. The Government further proceeded to show by the same testimony what funds certain of the credits just mentioned represented. Under each of these counts such credits included a note or notes sent by Mr. Dickinson to the South Danvers Bank for discount and there discounted and credited to his account.

Under the fifth and seventh counts the corresponding evidence was similar to that under the counts last above mentioned, except that, as has been stated above, the checks in question under the fifth and seventh counts were posted to the ledger on the day they came into the bank, and the credits to Mr. Dickinson's account as to which the Government introduced evidence were credits on that day.

80 The following table summarizes the evidence above outlined.

The first and second columns merely repeat for convenience a portion of the table given above on page 19 [71], and contain the numbers of the various counts, the dates of the alleged misapplications, and the amount of the check in question under each count. The second column contains the date on which each of such checks was posted to Mr. Dickinson's account in the ledger. The third column contains the credits to Mr. Dickinson's account on the dates given in the second column. So far as it appeared in evidence that any of these credits represented notes discounted for Mr. Dickinson, the name of the maker of such note is placed in the fourth column op-

posite the credit which represented such note, and the fifth column shows the face amount of such note so far as that appeared in evidence. As in the previous table the counts upon which the defendants were found guilty are indicated by underscoring:

Count, date, and amount of check.	Check entered in ledger.	Credits to Dickinson's account.	Including proceeds of notes as follows:	
			Maker.	Amount.
4 & 5.				
June 10 & 13-99, $4,000 & $4,500	June 13, 1899.	750	Dickinson, trustee	$6,000
		6,000	Penacook Mfg. Co	2,500
		2,500		
11.				
July 11-99, $3,200 ($2,000) ($1,900)	Sept. 1, 1899.	2,523.60	Col. W. & So. R. R. Co	
		2,500	Col. W. & So. R. R. Co	
		200		
		500		
		10,000	Ala. Kaolin Co	10,000
10.				
Nov. 7-99, $1,800	Nov. 10, 1899.	1,949.60	Hyland Foundry Co	2,000
9.				
Nov. 27-99, $4,000	Feb. 1, 1900.	5,818.80	W. H. Thorpe	6,000
8.				
Nov. 28-99, $4,500	Jan. 30, 1900.	3,420.68	D. H. Fitch	3,500
		1,175.80	Chas. E. Davis	
6.				
Dec. 16-99, $2,500	Feb. 15, 1900.	5,818.80	W. P. D. & Co	6,000
12.				
Jan. 17-00, $1,750	Feb. 13, 1900.	3,879.33	Penacook Mfg. Co	4,000
15.				
Jan. 24-00, $1,721.50	Feb. 17, 1900.	3,883.20	Dickinson, trustee	4,000
		309.45		
7.				
Feb. 21-00, $2,500	Feb. 21, 1900.	2,715.44	Geo. W. Sias	2,800
1.				
Mar. 19-00, $3,337.92	Mar. 24, 1900.	3,482.50	D. H. Fitch	3,800
		3,885.20	W. A. Garratt	4,000
		4,865.67	Geo. W. Sias	5,000
		1,949.60	Dickinson, trustee	2,000
		1,946.27	J. W. Dickinson	2,000
		2,891.20		
3.				
May 14-00, $2,488	May 14, 1900.	The check connected with this count was charged on the day it came in, as has already appeared. There was no evidence as to any credits to Mr. Dickinson's account on that day, nor as to the discount of any notes on that day.		

For explanatory notes see below.

EXPLANATORY NOTES RELATING TO ABOVE TABLE.

The amounts in parenthesis in the first column under the eleventh count represent checks for $2,000 and $1,900, which came into the bank July 1 and July 7, as has already appeared in the evidence under the eleventh count. These checks as well as the $3,200 check connected with the eleventh count were first entered in the ledger on September 1.

The Government contended that the notes appearing as discounted in the above table were put into the bank by Mr. Dickinson, and discounted by Mr. Foster, in order to cover up the transactions complained of in the indictment.

Mr. Dickinson testified in regard to all these notes that he
82 did not send them down to be used as covers in any sense, except in the sense that in some cases he knew he had overdrafts, and sent these notes down to help take care of these overdrafts, as was his custom during all the period after he became a depositor at the bank. As already stated, Mr. Dickinson testified that he never knew until preparing for the trial that his overdrafts were not entered as such in the books on the days when they occurred.

Mr. Dickinson also testified as to all the notes in question that at the time he sent each one to the bank for discount he considered it good commercial paper, and expected that it would be paid.

Mr. Foster testified that none of the notes in question were discounted to cover up the transactions complained of, except in the sense that the proceeds of these notes were used in some cases to make good Mr. Dickinson's overdrafts.

There was no direct evidence as to any understanding or arrangement between Mr. Dickinson and Mr. Foster in regard to sending down these notes for discount.

It appeared in connection with some of the counts of the indictment that notes were discounted and credited to Mr. Dickinson's account shortly after the transactions complained of in these counts, and some time before the checks connected with those transactions were entered in the ledger, and that there were entered in the ledger on the days when these notes were discounted other checks of Mr. Dickinson's not connected with the transactions complained of, whose payment had resulted in overdrafts, and which had not been entered in the ledger on the days when they were paid. It also appeared that the checks connected with the transactions complained of were not in all cases entered in the ledger in the order in which they came into the bank. There was no direct evidence of any understanding or arrangement between Mr. Dickinson and Mr. Foster as to what notes should be applied to any particular overdraft, and no direct evidence that in selecting the checks to be entered in the ledger on the day when any particular note was discounted Mr. Foster was guided by any consideration other than the relative size of the checks and the notes.

83 In connection with the discount of notes included in the table last above given, certain additional facts appeared by the testimony of Mr. Dickinson and Mr. Foster and by the books of the bank.

The note of W. P. Dickinson & Company, for $6,000, appearing in the table under the sixth count, took the place of a $3,000 note of the same maker, held by the South Danvers Bank, which was to fall due on the following day (February 16); and, to the extent of $3,000, the $6,000 note was a renewal of the previous note.

The $4,000 note of the Penacook Manufacturing Company, appearing in the table under the twelfth count, took the place of a $2,500 note of the same maker, held by the South Danvers Bank, which fell

due February 12, 1900. To the extent of $2,500, the $4,000 note was a renewal of the previous note.

The following table summarizes such of Mr. Dickinson's testimony above outlined as related to the payment by him with funds derived from his overdraft checks on the South Danvers Bank (payment of which checks formed the basis for the charges in the various counts of the indictment) of drafts drawn on him by the South Danvers Bank, and of notes which he placed at the bank or other banks, renewals of such notes or a substituted note being immediately afterwards discounted at the South Danvers Bank and credited to his account. The first column shows the number of the count and the amount of the check drawn by Mr. Dickinson on the South Danvers Bank, payment of which formed the basis of the charge in such count. The second column shows the date of payment of such check. The third and fourth columns show the amount of the drafts drawn on Mr. Dickinson by the South Danvers Bank, and the names of the makers and amounts of notes which Mr. Dickinson testified that he paid with the proceeds of the checks referred to in the first and second columns, the third column showing the notes which he had placed at the South Danvers Bank and the drafts drawn on him by the South Danvers Bank, and the fourth column the notes which he had placed at other banks. The fifth column shows the date on which he testified that such notes or drafts were paid. The sixth column contains the names of the makers and the amounts of notes discounted by the South Danvers Bank about the time of
84 the aforesaid payments, which notes Mr. Dickinson testified were renewals of the notes so paid by him, or in one case a note substituted for a note so paid by him. In the case of a few of such notes where the note discounted was a renewal of a note previously held by the South Danvers Bank, there was no testimony one way or the other as to any specific agreement between Mr. Dickinson and Mr. Clark as to renewals by the South Danvers Bank; but in the case of each of the other notes Mr. Dickinson testified that Mr. Clark had specifically agreed before he drew on the South Danvers Bank that that bank would discount a renewal of the note in question. The eighth column contains the dates of discount of the notes designated in the seventh column.

86 Count and amt. of check.	Date of payment.	Notes held by S. D. bank paid, or drafts drawn by S. D. bank on Dickinson paid.		Notes held by other banks paid.		Date of payment.	Notes discounted by South Danvers bank.		Date of discount.
4th $4,000.	June 10,1899			Norfolk Mfg. Co.	$1,000	June 12,1899			
				" " "	$700	" " "			
5th $4,500.	June 13,1899	Penacook Mfg Co.	$2,500	T. W. Spencer	$500	" " "	T. W. Spencer	$500	June 10,1899
						June 12,1899	Penacook Mfg. Co.	2,500	" 13,1899
11th $3,200.	July 11,1899	W. A. Garratt	$350						
				Norfolk Mfg. Co.	$3,000	July 20,1899	W. A. Garratt	350	
						" 10, "			
10th $1,800.	Nov. 7,1899	Highland Fdry. Co.	$2,000			Nov. 6,1899	Highland Fdry. Co.	2,000	Nov. 10,1899
		W. A. Garratt	$3,000			" " "	W. A. Garratt	2,000	" 7,1899
		G. H. Fera	$700			" " "	G. H. Fera	700	" " "
9th $4,000.	Nov. 27,1899	Gale & Kent	$1,000			Nov. 27,1899	Gale & Kent	1,000	" 28,1899
		Woodbridge	$1,500			" 29,1899	$1,500 paid bank by Dickinson in cash.		Dec. 4,1899
8th $4,500.	Nov. 28,1899	Draft drawn by S. D. bank on Dickinson	$6,900			Nov. 27,1899			
6th $2,500.	Dec. 16,1899	Geo. W. Sias	$3,500			Dec. 15,1899	Geo. W. Sias	$3,000	Dec. 19,1899
12th $1,750.	Jan. 17,1900	Highland Fdry. Co.	$2,000			Jan. 16,1900	Highland Fdry. Co.	$3,000	Jan. 19,1900
7th $2,500.	Feb. 21,1900	L. H. Schneider	$3,000			Feb. 20,1900	Geo. W. Sias	$2,800	Feb. 21,1900
				Highland Fdry. Co.	$2,500	Mch. 15,1900	Highland Fdry. Co.	$2,500	Mch. 15,1900
				W. H. Towne	$500	" " "	W. H. Towne	$500	" " "
1st $3,527.92	Mar. 19,1900			Norfolk Mfg. Co.	1,500	May 10,1900			
				" " "	700	" 14, "			
3rd $2,488.	May 14,1900			Geo. W. Sias	1,000	" 11, "	Geo. W. Sias	$1,000	May 16,1900

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86 In each case in the foregoing schedule where in the third column drafts drawn on Mr. Dickinson by the South Danvers Bank, or notes held by the South Danvers Bank, are shown as paid, payment of such drafts or notes was verified by the books of the bank, and in the case of these drafts and notes and also the notes held by other banks shown in the fourth column, checks of Mr. Dickinson drawn on the Shawmut or the Hamilton banks for the payment of the drafts and notes were put in evidence, the dates and amounts of the checks corresponding with the dates of payment and amounts of the notes. In each case where notes are shown in the sixth column as discounted at the South Danvers Bank, it appeared from the books of the bank that these notes were discounted as set forth.

Mr. Clark was present during the trial but was not called as a witness by either side to testify. At the former trial he was called by the Government and testified as a witness for the Government.

AMOUNTS OF NOTES HELD BY THE BANK ON WHICH MR. DICKINSON WAS DIRECTLY OR CONTINGENTLY LIABLE.

As bearing on the intent of the defendants Foster and Dickinson in the transactions complained of in the indictment, evidence was introduced as to the amount of notes held by the South Danvers Bank at the dates of those transactions, on which Mr. Dickinson was directly or contingently liable.

It appeared in evidence that during the period covered by the various counts of the indictment there were held by the South Danvers Bank, having been discounted for Mr. Dickinson, notes of John W. Dickinson, John W. Dickinson, trustee, and W. P. Dickinson & Co. On these notes Mr. Dickinson was directly liable.

At various times during the same period there were held by the bank, having been placed there for discount by Mr. Dickinson and covered by his guaranty, notes of the following persons: Napoleon J. Holmes, Nelson H. Bush, Highland Foundry Co., Penacook Mfg. Co., D. P. Flanders, George H. Fera, Gertrude H. Dickinson, Alabama Kaolin Co., G. A. Alexander, S. A. F. Whipple, Masonic Temple & Safety Deposit Co., Mary F. Davis, A. H. Blackmer,
J. C. Bunnell, Plumbers' Woodworking Co., Josephine A.
87 Owens, Edwin H. Gay, Mary E. Oakley, Gale & Kent, Foster & Sias, G. H. Morrill, Charles E. Davis, S. A. Simpson, Arthur G. Brigham, Walter H. Thorpe, A. F. Walch, W. R. Robinson, Bell Mfg. Co., W. H. Towne, W. A. Garratt, Herbert H. Blake, P. W. Elliott, James L. Clark, U. K. Mayo, Henry W. Woodbridge, T. W. Spencer, A. W. Bond & Co., D. H. Fitch, R. A. Connell, Columbus, Welston & So. R. R. Co., Frank W. Yerxa, M. W. O'Brien, R. C. Metcalf, S. L. Gabriel, E. A. Sanborn, George W. Adams, Carlinville Water Co., Henry N. Libbey as trustee, L. H. Schneider, W. S. Butler & Co., Flora A. McKenzie, George W. Sias. On these notes Mr. Dickinson was contingently liable for reasons before stated and by virtue of his general guaranty on May 8, 1898.

The evidence introduced by the Government related to the notes of certain of the persons and corporations enumerated above. These persons and corporations were John W. Dickinson, John W. Dickinson, trustee, W. P. Dickinson & Co., Penacook Mfg. Co., Plumbers' Woodworking Co., Alabama Kaolin Co., Foster & Sias, Fitch, Garratt, Schneider, Sias and Thorpe.

A very large part of the Government's evidence in the case related in one way or another to these notes, and included evidence bearing upon the financial responsibility or want thereof of the makers, and the knowledge possessed by the defendants, Foster and Dickinson, as to such financial responsibility or want thereof. Notes of these makers will hereafter, for convenience, be referred to as the "paper criticized by the Government." No evidence was introduced on either side, except such as was given by the defendant Dickinson, as to the financial responsibility of any of the persons and corporations whose notes Mr. Dickinson placed at the South Danvers Bank, other than those last above enumerated.

The evidence as to the amount of the paper criticized by the Government which was held by the South Danvers Bank at various times is summarized below. The dates referred to are the dates of the transactions complained of in the various counts of the indictment (except the sixth and second counts, which were omitted in this evidence).

88	Name of maker.		Amount of note.
1899			
June 10			
	Direct liability		
	John W. Dickinson	$12,750	
	John W. Dickinson trustee	3,000	
	W. P. Dickinson & Co	8,725	$24,475
	Contingent liability		
	Walter H. Thorpe	2,000	
	Penacook Mfg. Co	10,000	
	Alabama Kaolin Co	4,425	
	W. A. Garratt	3,000	
	D. H. Fitch	5,850	
	L. H. Schneider	8,500	
	Geo. W. Sias	5,206	38,981
			$63,456
1899			
June 13			
	Direct liability		
	J. W. Dickinson	$12,750	
	J. W. Dickinson, trustee	3,000	
	W. P. Dickinson & Co	8,725	24,475
	Contingent liability		
	Walter H. Thorpe	2,000	
	Penacook Mfg. Co	7,500	
	Alabama Kaolin Co	4,425	
	W. A. Garratt	3,000	
	D. H. Fitch	5,850	
	L. H. Schneider	8,500	
	Geo. W. Sias	5,206	36,481
			$60,956

	Name of maker.	Amount of note.	
1899			
July 11			
	Direct liability		
	John W. Dickinson	$12,750	
	John W. Dickinson, trustee	9,000	
	W. P. Dickinson & Co	10,525	$32,275
	Contingent liability		
	Walter H. Thorpe	2,000	
	Penacook Mfg. Co	10,000	
	Alabama Kaolin Co	4,425	
	Foster & Sias	128	
	W. A. Garratt	3,000	
	D. H. Fitch	5,850	
	L. H. Schneider	8,500	
	George W. Sias	5,050	38,953
			$71,228
89	Sept. 23		
	Direct liability		
	J. W. Dickinson	$12,750	
	J. W. Dickinson, trustee	9,000	
	W. P. Dickinson & Co	10,525	$32,275
	Contingent liability		
	Walter H. Thorpe	2,000	
	Penacook Mfg. Co	10,000	
	Alabama Kaolin Co	14,425	
	Foster & Sias	6,200	
	Plumbers' Woodworking Co	6,000	
	W. A. Garratt	3,000	
	D. H. Fitch	5,850	
	L. H. Schneider	8,500	
	Geo. W. Sias	5,050	61,025
			$93,300
1899			
Nov. 7			
	Direct liability		
	John W. Dickinson	$12,750	
	John W. Dickinson, trustee	9,000	
	W. P. Dickinson & Co	10,525	32,275
	Contingent liability		
	Walter H. Thorpe	2,000	
	Penacook Mfg. Co	10,000	
	Alabama Kaolin Co	14,425	
	Foster & Sias	6,200	
	Plumbers' Woodworking Co	10,000	
	W. A. Garratt	3,000	
	D. H. Fitch	5,850	
	L. H. Schneider	8,500	
	Geo. W. Sias	6,015	65,990
			$98,265
1899			
Nov. 27			
	Direct liability		
	John W. Dickinson	$12,750	
	John W. Dickinson, trustee	9,000	
	W. P. Dickinson & Co	10,525	22,275
	Contingent liability		
	Walter H. Thorpe	2,000	

90	Name of maker.		Amount of note.
1899			
Nov. 27			
	Penacook Mfg. Co	$10,000	
	Alabama Kaolin Co	14,425	
	Foster & Sias	6,338.10	
	Plumbers' Woodworking Co	10,000	
	W. A. Garratt	2,000	
	D. H. Fitch	5,850	
	L. H. Schneider	8,500	
	Geo. W. Sias	6,015	$65,128.10
			$97,403.10
Nov. 28			
	Direct liability		
	John W. Dickinson	$12,750	
	John W. Dickinson, trustee	9,000	
	W. P. Dickinson & Co	10,525	32,275
	Contingent liability		
	Walter H. Thorpe	2,000	
	Penacook Mfg. Co	10,000	
	Alabama Kaolin Co	14,425	
	Foster & Sias	6,338.10	
	Plumbers' Woodworking Co	10,000	
	W. A. Garratt	2,000	
	D. H. Fitch	5,850	
	L. H. Schneider	8,500	
	Geo. W. Sias	6,715	65,828.10
			$98,103.10
1900			
Jan. 17			
	Direct liability		
	John W. Dickinson	$12,750	
	John W. Dickinson, trustee	9,000	
	W. P. Dickinson & Co	10,525	32,275
	Contingent liability		
	Walter H. Thorpe	2,000	
	Penacook Mfg. Co	10,000	
	Alabama Kaolin Co	14,425	
	Foster & Sias	6,200	
	Plumbers' Woodworking Co	10,000	
	W. A. Garratt	2,000	
	D. H. Fitch	8,850	
	L. H. Schneider	8,500	
	George W. Sias	6,215	68,190
			$100,465
91	Jan. 24		
	Direct liability		
	John W. Dickinson	$12,750	
	John W. Dickinson, trustee	9,000	
	W. P. Dickinson & Co	10,525	$32,275
	Contingent liability		
	Walter H. Thorpe	2,000	
	Penacook Mfg. Co	10,000	
	Alabama Kaolin Co	14,425	
	Foster & Sias	6,200	
	Plumbers' Woodworking Co	10,000	
	W. A. Garratt	2,000	
	D. H. Fitch	8,850	
	L. H. Schneider	8,500	
	Geo. W. Sias	6,215	64,840
			$97,465

	Name of maker.		Amount of note.
1900			
Feb. 15			
	Direct liability		
	John W. Dickinson	$12,750	
	John W. Dickinson, trustee	9,000	
	W. P. Dickinson & Co	10,525	$32,275
	Contingent liability		
	Walter H. Thorpe	8,000	
	Penacook Mfg. Co	13,000	
	Alabama Kaolin Co	14,425	
	Foster & Sias	3,200	
	Plumbers' Woodworking Co	10,000	
	W. A. Garratt	2,000	
	D. H. Fitch	11,500	
	L. H. Schneider	8,500	
	Geo. W. Sias	5,490	76,115
			$108,390
Feb. 21			
	Direct liability		
	John W. Dickinson	$12,750	
	John W. Dickinson, trustee	13,000	
	W. P. Dickinson & Co	13,525	39,275
	Contingent liability		
	Walter H. Thorpe	8,000	
	Penacook Mfg. Co	13,000	
	Alabama Kaolin Co	14,425	
	Foster & Sias	3,200	
	Plumbers' Woodworking Co	10,000	
92	W. A. Garratt	$2,000	
	D. H. Fitch	11,500	
	L. H. Schneider	8,500	
	Geo. W. Sias	5,490	$76,115
			$115,390
1900			
March 19			
	Direct liability		
	John W. Dickinson	$12,150	
	John W. Dickinson, trustee	13,000	
	W. P. Dickinson & Co	13,525	38,675
	Contingent liability		
	Walter H. Thorpe	8,000	
	Penacook Mfg. Co	15,000	
	Alabama Kaolin Co	14,425	
	Foster & Sias	3,200	
	Plumbers' Woodworking Co	10,000	
	W. A. Garratt	2,000	
	D. H. Fitch	11,500	
	L. H. Schneider	5,500	
	Geo. W. Sias	8,460	78,085
			$116,760
May 14			
	Direct liability		
	John W. Dickinson	$14,150	
	John W. Dickinson, trustee	15,000	
	W. P. Dickinson & Co	13,535	42,675
	Contingent liability		
	Walter H. Thorpe	8,000	
	Penacook Mfg. Co	15,000	
	Alabama Kaolin Co	14,425	

	Name of maker.		Amount of note.
May 14			
	Contingent liability		
	Foster & Sias	$3,200	
	Plumbers' Woodworking Co	10,000	
	W. A. Garratt	6,000	
	D. H. Fitch	15,000	
	L. H. Schneider	10,500	
	Geo. W. Sias	13,725	$95,850
			$138,525

When reference is made to the amount of notes held by the bank at any particular time, on which Mr. Dickinson was directly or contingently liable, it is not intended to indicate that notes to that
93 amount were due at that time; a very small portion of the paper placed by Mr. Dickinson at the bank fell due at any one time, but some of the Dickinson notes were demand notes.

There was no direct evidence as to the amounts of notes of other makers placed at the bank by Mr. Dickinson and covered by his guaranty, which were held by the bank on the dates referred to in the evidence for the Government last above stated.

Evidence was introduced by the defence showing that the total amounts of notes held by the bank on which Mr. Dickinson was directly or contingently liable on April 8, 1898, September 26, 1898, and March 25, 1899, were as follows:

Date.	Direct liability.	Contingent liability.
April 8, 1898	$16,200	$11,675.16
Sept. 26, 1898	16,250	46,953.20
Mar. 25, 1899	19,175	81,618.95

The figures as to direct liability represent notes of John W. Dickinson, John W. Dickinson, trustee, and W. P. Dickinson & Company. The figures as to contingent liability include all other notes placed at the bank by Mr. Dickinson and covered by his guaranty.

Detailed evidence as to the notes making up the above amounts appears elsewhere in this bill of exceptions. (Pages 10 [63] to 11 [64] and 73 [121] to 78 [128].)

The Government introduced evidence showing the proportion of the paper criticized which had collateral. The following table shows the total amounts of notes of the makers named, which were held by the bank on May 14, 1900, and the portion of each of those amounts which had collateral:

Maker.	Total amount.	Amount secured.
John W. Dickinson	$14,150	$4,400
W. P. Dickinson & Co	13,535	7,250
D. H. Fitch	15,000	5,000
Geo. W. Sias	13,725	3,000

The collateral held by the bank on May 14, 1900, to secure these notes was as follows:

The $4,400 of notes of John W. Dickinson was secured by three $500 bonds of the Alabama Kaolin Company, one $500 bond Winterport Water Company, and five $500 bonds Concord Company.

94 The $7,250 of notes of W. P. Dickinson & Company was secured by two $500 bonds Concord Company, eight $500 bonds Concord Company, and seven $500 bonds Concord Company.

The $5,000 note of D. H. Fitch was secured by eight $500 bonds Alabama Kaolin Company, and six $500 bonds Concord Company.

The $3,000 note of Geo. W. Sias was secured by one $500 bond Winterport Company, and six $500 bonds Alabama Kaolin Company.

The proportion of collateral notes among the notes of these makers held by the bank in September, 1899, and March, 1899, was somewhat larger. None of the notes of the other makers included in the paper criticized by the Government were collateral notes.

There was some evidence as to the proportion of all notes held by the bank, which were secured by collateral. This evidence consisted of a statement of Horace Bushby, one of the directors, who was called as a witness for the Government, that only a small proportion of all the notes discounted by the bank were collateral notes, and such information on the subject as is afforded by the lists given on pages 73 [121] to 78 [128] below.

DATES OF DISCOUNT AND RENEWAL OF THE PAPER CRITICIZED BY THE GOVERNMENT.

In further explanation of the evidence already stated as to the amount of the paper criticized, which was held by the bank at the time of the transactions complained of, the Government introduced evidence, showing in connection with each maker the amounts of his paper held by the bank at various times from the spring of 1897 to September, 1900, when each note was first discounted at the bank, which notes were renewed, and when, and by what notes, and in what cases the proceeds of the note were credited to Mr. Dickinson's account as a depositor.

Such of this evidence as related to the notes of John W. Dickinson is briefly summarized in the table on the following page.

The first column shows the dates between March 4, 1897, and September 6, 1900, when notes of John W. Dickinson were discounted at the South Danvers bank. In those cases in which the proceeds of the note were credited to Mr. Dickinson's account as a depositor,

the word "deposited" appears in the second column oppo-

95 site the date. The third column shows the date of maturity of each note. The fourth column shows the amount, and the last column shows the date upon which each note was taken up by payment or renewal. In the case of notes which had not been paid or renewed up to September, 1900, the last column is blank. Where

two dates appear in the last column opposite a single note, a partial payment on such note was made on the first date, and the balance was paid or renewed on the second date. For convenience of reference at the trial the notes were numbered in the order in which they came into the bank, and these numbers appear in the fifth column:

List of notes signed "John W. Dickinson," entered as discounted on the books of the South Danvers National Bank.

Date.	Deposited.	Maturity.	Amount.	No.	Date of payment or renewal.
1897.					
Mar. 4		Sept. 2	$2,060	1	Sept. 3, 1897
Sept. 3		Mar. 2	2,060	2	Mar. 2, 1898
Sept. 18		Jan. 17	2,000	3	Jan. 17, 1898
Dec. 28		June 27	3,000	4	June 29, 1898
1898.					
Jan. 17		May 17	2,000	5	May 19, 1898
Feb. 10		Demand	3,000	6	Mar. 24, 1898
Mar. 2		July 2	2,000	7	July 22, 1898
Mar. 31		Demand	1,000	8	
May 19		July 17	2,000	9	Sept. 8, 1898
June 29		Aug. 27	3,000	10	Aug. 30, 1898
July 22		Sept. 18	2,000	11	Sept. 22, 1898
Aug. 30		Dec. 27	3,000	12	Dec. 28, 1898
Sept. 8		Nov. 5	2,000	13	Nov. 12, 1898
Sept. 22		Jan. 19	2,000	14	Jan. 23, 1899
Nov. 22	Deposited.	Demand	7,500	15	
Dec. 28		Apr. 27	3,000	16	May 4, 1899
1899.					
Jan. 23		May 19	2,000	17	May 20, 1899
May 4		Sept. 27	3,000	18	Sept. 28, 1899
May 20		Sept. 19	2,000	19	May 25, 1899 Sept. 20, 1899
Sept. 20		Jan. 19	1,250	20	Jan. 24, 1900
Sept. 28		Jan. 28	3,000	21	Jan. 30, 1900
1900.					
Jan. 24		May 21	1,250	22	May 22, 1900
Jan. 30		June 29	3,000	23	Mar. 6, 1900 July 6, 1900
96					
Mar. 24	Deposited.	Aug. 24	2,000	24	Sept. 6, 1900
May 22		Nov. 21	1,250	25	
July 6		Dec. 31	2,388.60	26	
Sept. 6		Feb. 25	2,000	27	

The majority of the notes appearing in the above list as discounted were renewals of previous notes. For example: Note #1, discounted March 4, and appearing above as paid or renewed on September 3, 1897, was, in fact, renewed by note #2, which appears above as discounted on September 3. Note #2 was renewed by #7 for a slightly less amount. Note #7 was renewed by #11, #11 by #14, #14 by #17, #17 by #19. Seven hundred and fifty was paid on #19 on May 25, and the balance of $1,250 was renewed on September 20 by #20. #20 was renewed by #22, and #22 by #25.

The extent to which the discount of the notes in the above list represented increases of the total amount of such notes held by the bank is indicated in the table on the following page.

[The first column shows certain dates between September 3, 1897, and September 6, 1900, on which notes of John W. Dickinson were discounted, paid or renewed at the South Danvers bank. Opposite

each date in the third column there appear separately the amounts of the notes of John W. Dickinson held by the bank on that date. The numbers in the second column correspond with the numbers in the list last above given, and identify the notes whose amounts are placed opposite in the third column. The fourth column shows the total amount of the notes of John W. Dickinson remaining in the bank unpaid after the transaction of the date of the first column. For example, it appears by the table below that on September 18, 1897, the bank held two notes of John W. Dickinson for $2,060 and $2,000, respectively, making total of $4,060. On December 28 a new note for $3,000 was discounted, the other two remaining in the bank, so that at the close of that day the bank held three notes amounting to $7,060. On January 17, 1898, it appears that there was no change in the total nor in the number or amounts of notes held, but the figures in the second column show that note #3 was renewed on January 17 by note #5 for the same amount,—January 17 being the date of maturity of note #3, as appears by the preceding table. Again it appears by this table that on March 2, 1898, there were in the bank four notes of John W. Dickinson, amounting altogether to $10,000. It appears that on March 31 three of those notes
97 were still in the bank—Nos. 4, 5, and 7. In place of one for $3,000 (#6) there appears on March 31 a note for $1,000 (#8). It is thus apparent that on or before March 31 note #6 was paid, and a new note for $1,000 was discounted on March 31. The preceding table shows that note #6 was in fact paid on March 24.]

Amount of John W. Dickinson's notes held by the bank at different dates.

Date.	No.	Amount.	Bal. unpaid	Date.	No.	Amount.	Bal. unpaid.
1897				1898			
Sept. 3	(2)	$2,060	$2,060	June 29	(7)	$2,000	
Sept. 18	(2)	2,060			(8)	1,000	
	(3)	2,000	4,060		(9)	2,000	
Dec. 28	(2)	2,060			(10)	3,000	$8,000
	(3)	2,000		July 22	(8)	1,000	
	(4)	3,000	7,060		(9)	2,000	
1898					(10)	3,000	
Jan. 17	(2)	2,060			(11)	2,000	8,000
	(4)	3,000		Aug. 30	(8)	1,000	
	(5)	2,000	7,060		(9)	2,000	
Feb. 10	(2)	2,060			(11)	2,000	
	(4)	3,000			(12)	3,000	8,000
	(5)	2,000		Sept. 8	(8)	1,000	
	(6)	3,000	10,060		(11)	2,000	
Mar. 2	(4)	3,000			(12)	3,000	
	(5)	2,000			(13)	2,000	8,000
	(6)	3,000		Sept. 22	(8)	1,000	
	(7)	2,000	10,000		(12)	3,000	
Mar. 31	(4)	3,000			(13)	2,000	
	(5)	2,000			(14)	2,000	8,000
	(7)	2,000		Nov. 12	(8)	1,000	
	(8)	1,000	8,000		(12)	3,000	
May 19	(4)	3,000			(14)	2,000	
	(7)	2,000		Nov. 22	(8)	1,000	6,000
	(8)	1,000			(12)	3,000	
	(9)	2,000			(14)	2,000	
			8,000		(15)	7,500	13,500

Amount of John W. Dickinson's notes held by the bank at different dates—Con.

Date.	No.	Amount.	Bal. unpaid.	Date.	No.	Amount.	Bal. unpaid.
1898				1900			
Dec. 28	(8)	$1,000		Jan. 30	(8)	$1,000	
	(14)	2,000			(15)	7,500	
98	(15)	7,500			(22)	1,250	
	(16)	3,000	$13,500		(23)	3,000	$12,750
Jan. 23	(8)	1,000		Mar. 6	(8)	1,000	
	(15)	7,500			(15)	7,500	
	(16)	3,000			(22)	1,250	
	(17)	2,000	13,500		(23)	2,400	12,150
May 4	(8)	1,000		Mar. 24	(8)	1,000	
	(15)	7,500			(15)	7,500	
	(17)	2,000			(22)	1,250	
	(18)	3,000	13,500		(23)	2,400	
May 20	(8)	1,000			(24)	2,000	14,150
	(15)	7,500		May 22	(8)	1,000	
	(18)	3,000			(15)	7,500	
	(19)	2,000	13,500		(23)	2,400	
May 25	(8)	1,000			(24)	2,000	
	(15)	7,500			(25)	1,250	14,150
	(18)	3,000		July 6	(8)	1,000	
	(19)	1,250	12,750		(15)	7,500	
Sept. 20	(8)	1,000			(24)	2,000	
	(15)	7,500			(25)	1,250	
	(18)	3,000			(26)	2,388.60	14,138.60
	(19)	1,250	12,750	Sept. 6	(8)	1,000	
Sept. 28	(8)	1,000			(15)	7,500	
	(15)	7,500			(25)	1,250	
	(19)	1,250			(26)	2,388.60	
	(21)	3,000	12,750		(27)	2,000	14,138.60
1900							
Jan. 24	(8)	1,000					
	(15)	7,500					
	(21)	3,000					
	(22)	1,250	12,750				

Evidence corresponding to that summarized in both the above tables was introduced in behalf of the Government in connection with the notes of all the other makers included in the paper criticized by the Government. Such of this evidence as corresponds to the last table above is given below.

99 *Amount of notes of John W. Dickinson, trustee, held by the bank at different dates.*

Date.	No.	Amount.	Bal. unpaid.	Date.	No.	Amount.	Bal. unpaid.
1898.				1900.			
June 1	(1)	$1,000	$1,000	Feb. 17	(2)	$800	
June 29	(1)	1,000			(4)	2,200	
	(2)	800	1,800		(6)	6,000	
Aug. 6	(2)	800			(7)	4,000	$13,000
	(3)	1,000	1,800	Mar. 24	(2)	800	
Sept. 24	(2)	800			(4)	2,200	
	(3)	1,000			(6)	6,000	
	(4)	2,200	4,000		(7)	4,000	
Nov. 2	(2)	800			(8)	2,000	15,000
	(4)	2,200		Sept. 6	(2)	800	
	(5)	1,000	4,000		(4)	2,200	
1899.					(6)	6,000	
Feb. 2	(2)	800			(7)	4,000	
	(4)	2,200	3,000		(9)	2,000	15,000
June 13	(2)	800		Sept. 6	(2)	800	
	(4)	2,200			(4)	2,200	
	(6)	6,000	9,000		(6)	6,000	
					(9)	2,000	
					(10)	4,000	15,000

Amount of notes of W. P. Dickinson & Company held by the bank at different dates.

Date.	No.	Amount.	Bal. unpaid.	Date.	No.	Amount.	Bal. unpaid.
1896.				1899.			
Oct. 20	(1)	$2,000		Mar. 24	(1)	$1,500	
			$2,000		(17)	1,200	
1897.					(18)	2,275	
Feb. 13	(1)	2,000					$5,975
	(2)	2,050		Mar. 31	(1)	1,500	
			7,050		(17)	1,200	
Mar. 29	(1)	2,000			(18)	3,275	
	(2)	4,150			(19)	4,500	
			6,150				10,475
Apr. 13	(1)	2,000		May 5	(1)	1,500	
			8,000		(18)	3,275	
Apr. 16	(1)	2,000			(19)	4,500	
	(3)	4,000			(20)	1,200	
			6,000				10,475
June 1	(1)	2,000		May 5	(1)	1,500	
	(2)	4,000			(18)	3,275	
	(4)	2,000			(19)	3,500	
			8,000		(20)	1,200	
100 July 14	(1)	2,000					9,475
	(3)	4,000		May 25	(1)	750	
	(4)	1,200			(15)	3,275	
			7,200		(19)	3,500	
1897.					(20)	1,200	
Aug. 31	(1)	2,000					8,725
	(3)	4,000		June 15	(1)	750	
	(5)	1,200			(18)	3,275	
			7,200	101	(19)	3,500	
Oct. 19	(1)	2,000			(21)	3,275	
	(5)	1,200					10,525
	(6)	4,000		1899			
			7,200	July 3	(1)	750	
Nov. 1	(1)	2,000			(19)	3,500	
	(6)	4,000			(21)	3,000	
	(7)	1,200			(22)	3,275	
			7,200				10,525
Dec. 15	(1)	2,000		Aug. 1	(1)	750	
	(7)	1,200			(21)	3,000	
	(8)	4,000			(22)	3,275	
			7,200		(23)	3,500	
1898.							10,525
Jan. 4	(1)	2,000		Oct. 19	(1)	750	
	(8)	4,000			(22)	3,275	
	(9)	1,200			(23)	3,500	
			7,200		(24)	3,000	
1898.							10,525
Mar. 15	(1)	2,000		Nov. 7	(1)	750	
	(9)	1,200			(23)	3,500	
	(10)	4,000			(24)	3,000	
			7,200		(25)	3,275	
May 3	(1)	2,000					10,525
	(10)	4,000		Dec. 9	(1)	750	
	(11)	1,200			(24)	3,000	
			7,200		(25)	3,275	
May 14	(1)	2,000			(26)	3,500	
	(11)	1,200					10,525
	(12)	4,000		1900			
			7,200	Feb. 15	(1)	750	
July 12	(1)	2,000			(25)	3,275	
	(12)	4,000			(26)	3,500	
	(13)	1,200			(27)	6,000	
			7,200				13,525
July 13	(1)	2,000		1900			
	(13)	1,200		Mar. 14	(1)	750	
	(14)	4,000			(26)	3,500	
			7,200		(27)	6,000	
Sept. 8	(1)	2,000			(28)	3,275	
	(14)	4,000					13,525
	(15)	1,200		Mar. 16	(1)	750	
			7,200		(28)	3,500	
Sept. 15	(1)	2,000			(29)	3,275	
	(15)	1,200			(30)	3,000	
	(16)	4,000			(31)	3,000	
			7,200				13,525
Sept. 27	(1)	1,500		Apr. 5	(1)	750	
	(15)	1,200			(28)	3,275	
	(16)	4,000			(29)	3,000	
			6,700		(30)	3,000	
1898.					(31)	3,500	
Nov. 12	(1)	1,500					13,525
	(15)	1,200					
			2,700				
1899.							
Jan. 20	(1)	1,500					
	(17)	1,200					
			2,700				

Amount of notes of W. P. Dickinson & Company held by the bank at different dates—Continued.

Date.	No.	Amount.	Bal. unpaid.	Date.	No.	Amount.	Bal. unpaid.
1900				1900			
Sept. 6	(1)	$750		Sept. 6	(32)	$3,000	
	(28)	3,275			(33)	3,275	
	(30)	3,000					$13,525
	(31)	3,500		Sept. 10	(1)	750	
	(32)	3,000			(31)	3,500	
			$13,525		(32)	3,000	
Sept. 6	(1)	750			(33)	3,275	
	(30)	3,000			(34)	3,000	
	(31)	3,500					13,525

102 *Amount of notes of Peacock Mfg. Co. held by the bank at different dates.*

Date.	No.	Amount.	Bal. unpaid.	Date.	No.	Amount.	Bal. unpaid.
1897				1899			
Mar. 12	(1)	$2,500		June 2	(9)	$5,000	
			$2,500		(11)	2,500	
Aug. 16	(1)	2,500			(12)	2,500	
	(2)	2,500					$10,000
			5,000	June 12	(9)	5,000	
Sept. 11	(1)	2,500				2,500	
	(2)	2,500					7,500
	(3)	2,500		June 13	(9)	5,000	
			7,500		(12)	2,500	
Sept. 13	(2)	2,500			(13)	2,500	
	(3)	2,500					10,000
			5,000	Oct. 4	(9)	5,000	
Dec. 13	(3)	2,500			(13)	2,500	
			2,500		(14)	2,500	
1898							10,000
Jan. 29	(3)	2,500		Oct. 16	(9)	5,000	
	(4)	2,000			(14)	2,500	
			4,500		(15)	2,500	
Mar. 11	(4)	2,000					10,000
	(5)	2,000		1900			
			4,000	Feb. 6	(9)	5,000	
Aug. 8	(4)	2,000			(15)	2,500	
	(5)	2,000			(16)	4,000	
	(6)	1,000					11,500
			5,000	1900			
Aug. 10	(4)	2,000		Feb. 13	(9)	5,000	
	(6)	1,000			(16)	4,000	
			3,000		(17)	4,000	
Aug. 18	(6)	1,000					13,000
	(7)	2,000		103			
	(8)	2,000		1900			
			5,000	Mar. 1	(9)	$5,000	
Nov. 26	(6)	1,000			(16)	4,000	
	(7)	2,000			(17)	4,000	
	(8)	2,000			(18)	2,000	
	(9)	5,000					$15,000
			10,000	Sept. 4	(9)	5,000	
1899					(17)	4,000	
Jan. 12	(6)	1,000			(18)	2,000	
	(8)	2,000			(19)	4,000	
	(9)	5,000					15,000
			8,000	Sept. 4	(9)	5,000	
Feb. 7	(8)	2,000			(18)	2,000	
	(9)	5,000			(19)	4,000	
			7,000		(20)	4,000	
Feb. 19	(9)	5,000					$15,000
			5,000	Sept. 4	(9)	5,000	
Mar. 24	(9)	5,000			(19)	4,000	
	(10)	2,500			(20)	2,000	
	(11)	2,500			(21)	4,000	
			10,000				15,000

Amount of notes of Plumbers' Woodworking Company held by the bank at different dates.

Date.	No.	Amount.	Bal. unpaid.	Date.	No.	Amount.	Unpaid bal.
1899				1900			
Aug. 11	(1)	$6,000	$6,000	Mar. 1	(1)	$6,000	
					(4)	4,000	
Sept. 23	(1)	6,000					$10,000
	(2)	4,000		July 10	(1)	6,000	
			10,000		(4)	4,000	
							10,000

Amount of notes of Alabama Kaolin Company held by the bank at different dates.

Date.	No.	Amount.	Bal. unpaid.	Date.	No.	Amount.	Bal. unpaid.
1898				1900			
Oct. 3	(1)	$1,325	$1,325	Mar. 1	(1)	$1,325	
					(5)	5,000	
1899					(6)	3,100	
Jan. 26	(1)	1,325			(7)	5,000	
	(2)	3,100		104			$14,425
			4,425	Mar. 27	(1)	$1,325	
Mar. 30	(1)	1,325			(5)	5,000	
	(3)	3,100			(7)	5,000	
			4,425		(8)	3,100	
Aug. 1	(1)	1,325					$14,425
	(4)	3,100		July 6	(1)	$1,325	
			4,425		(5)	5,000	
Sept. 1	(1)	$1,325			(8)	3,100	
	(4)	3,100			(9)	5,000	
	(5)	10,000					$14,425
			$14,425				
Nov. 28	(1)	1,325					
	(5)	10,000					
	(6)	3,100					
			14,425				

Amount of notes of Foster & Sims held by the bank at different dates.

Date.	No.	Amount.	Bal. unpaid.	Date.	No.	Amount.	Bal. unpaid.
1899				1899			
June 22	(1)	$128	$128	Nov. 17	(3)	$3,000	
					(4)	3,200	
July 22	(1)	128			(5)	138.10	
	(2)	3,200					$6,338.10
			3,328	Dec. 11	(3)	3,000	
Aug. 5	(2)	3,200			(4)	3,200	
			3,200				6,200
Sept. 19	(2)	3,200		1900			
	(3)	3,000		Jan. 19	(4)	3,200	
			6,200				3,200
Nov. 22	(3)	3,000		June 9	(4)	2,200	
	(4)	3,200					2,200
			6,200				

Amount of notes of D. H. Fitch held by the bank at different dates.

Date.	No.	Amount.	Bal. unpaid.	Date.	No.	Amount.	Bal. unpaid.
1898				1898			
Feb. 23	(1)	$5,000	$5,000	Aug. 30	(3)	$5,000	
							$5,000
June 1	(1)	5,000		Sept. 1	(3)	5,000	
	(2)	745			(4)	850	
			5,745				5,850
June 20	(2)	745		Oct. 22	(4)	$850	
	(3)	5,000			(5)	5,000	
			5,745				$5,850

Amount of notes of D. H. Fitch held by the bank at different dates—Continued.

Date.	No.	Amount.	Bal. unpaid.	Date.	No.	Amount.	Bal. unpaid.
1898				1900			
Jan. 25	(4)	$850	$850	Jan. 30	(14)	$5,000	$12,350
Jan. 24	(4)	850		Feb. 3	(12)	3,000	
	(6)	5,000	5,850		(13)	3,500	
Jan. 31	(6)	5,000	5,000		(14)	5,000	11,500
Feb. 2	(6)	5,000		Mar. 24	(12)	3,000	
	(7)	800	5,800		(13)	3,500	
105					(14)	3,000	
					(15)	3,500	15,000
May 24	(7)	800		Apr. 25	(12)	3,000	
	(8)	5,000	5,800		(13)	3,500	
June 2	(8)	5,000			(14)	5,000	
	(9)	850	5,850		(16)	3,500	15,000
Sept. 26	(9)	850		June 2	(12)	3,000	
	(10)	5,000	5,850		(13)	3,500	
Oct. 10	(10)	5,000			(16)	3,500	
	(11)	850	5,850		(17)	5,000	15,000
1900				July 9	(13)	3,500	
Jan. 4	(10)	5,000			(16)	3,500	
	(11)	850			(17)	5,000	
	(12)	3,000	8,850		(18)	3,000	15,000
Jan. 30	(11)	850		July 9	(16)	3,500	
	(12)	3,000			(17)	5,000	
	(13)	5,500			(18)	3,000	
					(19)	3,500	15,000

Amount of notes of W. A. Garratt held by the bank at different dates.

Date.	No.	Amount.	Bal. unpaid.	Date.	No.	Amount.	Bal. unpaid.
1899				1900			
Mar. 24	(1)	$3,000	$3,000	Mar. 24	(2)	$2,000	
July 6	(1-a)	3,000	3,000		(3)	4,000	$6,000
Nov. 7	(2)	2,000	2,000	May 8	(3)	4,000	
					(4)	2,000	6,000

106 *Amount of notes of L. H. Schneider held by the bank at different dates.*

Date.	No.	Amount.	Bal. unpaid.	Date.	No.	Amount.	Bal. unpaid.
1898				1899			
Mar. 29	(1)	$3,000	$3,000	Oct. 20	(4)	$2,000	
May 25	(2)	3,000	3,000		(5)	3,500	$5,500
Aug. 2	(2)	3,000		Oct. 23	(4)	2,000	
	(2-a)	275	3,275		(5)	3,500	
Sept. 22	(2-a)	275	275		(8)	3,000	8,500
Sept. 24	(2-a)	275		1900			
	(3)	3,000		Feb. 21	(4)	2,000	
	(4)	2,000	5,275		(5)	3,500	5,500
Oct. 22	(3)	3,000		Mar. 24	(4)	2,000	
	(4)	2,000	5,000		(5)	3,500	
Dec. 8	(3)	3,000			(9)	5,000	10,500
	(4)	2,000		May 25	(4)	2,000	
	(5)	3,500	8,500		(5)	3,500	
1899					(10)	5,000	10,500
Mar. 7	(4)	2,000		July 24	(4)	2,000	
	(5)	3,500			(5)	3,500	
	(6)	3,000	8,500		(11)	5,000	10,500
June 22	(4)	2,000					
	(5)	3,500					
	(7)	3,000	8,500				

Amount of notes of Walter H. Thorpe held by the bank at different dates.

Date.	No.	Amount.	Bal. unpaid.	Date.	No.	Amount.	Bal. unpaid.
1898				1899			
May 7	(1)	$2,000		Sept. 6	(5)	$2,000	
			$2,000				$2,000
Sept. 15	(2)	2,000		1900			
			2,000	Jan. 6	(6)	2,000	
1899							2,000
Jan. 6	(3)	0		Feb. 1	(6)	2,000	
			0		(7)	6,000	
Jan. 12	(3)	$2,000					8,000
			2,000	July 10	(7)	6,000	
May 4	(4)	2,000			(8)	2,000	
			$2,000				8,000
Sept. 5	.....	0		Aug. 14	(8)	2,000	
			0		(9)	6,000	
							8,000

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Amount of notes of George W. Sias held by the bank at different dates.

Date.	No.	Amount.	Bal. unpaid	Date.	No.	Amount.	Bal. unpaid.
1898				1899			
Aug. 2	(1)	$883 64		Dec. 12	(9)	$965	
			$883 64		(10)	700	
Aug. 12	(1)	883 64		108	(11)	1,000	
	(2)	550					$6,715
			1,433 64	1899			
Sept. 22	(2)	550		Dec. 18	(6)	550	
			550		(9)	965	
1899					(10)	700	
Feb. 10	(3)	550			(11)	1,000	
			550		(12)	3,000	
Mar. 23	(3)	550					6,215
	(4)	3,500		1900			
			4,050	Jan. 24	(8)	550	
					(9)	965	
May 12	(3)	550			(10)	700	
	(4)	3,500			(11)	1,000	
	(5)	1,000			(12)	3,000	
			5,050		(13)	240	
May 23	(3)	550					6,455
	(4)	3,500		Feb. 12	(6)	550	
	(5)	1,000			(10)	700	
	(5-a)	156			(11)	1,000	
			5,206		(12)	3,000	
June 23	(3)	550			(13)	240	
	(4)	3,500					5,490
	(5)	1,000		Feb. 13	(10)	700	
			5,050		(11)	1,000	
Aug. 10	(3)	550			(12)	3,000	
	(4)	3,500			(13)	240	
	(5)	1,000			(14)	550	
	(6)	550					5,490
			5,600	Feb. 21	(10)	700	
Aug. 11	(4)	3,500			(11)	1,000	
	(5)	1,000			(12)	3,000	
	(6)	550			(13)	240	
	(7)	1,000			(14)	550	
			6,050		(15)	2,800	
Aug. 12	(4)	3,500					8,290
	(6)	550		Mar. 12	(10)	700	
	(7)	1,000			(11)	1,000	
			5,050		(12)	3,000	
Sept. 1	(6)	550			(13)	240	
	(7)	1,000			(14)	550	
	(8)	3,500			(15)	2,800	
			5,050		(16)	170	
Oct. 21	(6)	550					8,460
	(7)	1,000		Mar. 24	(10)	700	
	(8)	2,500			(11)	1,000	
	(9)	965			(12)	3,000	
			6,015		(13)	240	
Nov. 27	(6)	550			(14)	550	
	(7)	1,000			(15)	2,800	
	(8)	3,500			(16)	170	
	(9)	965			(17)	5,000	
	(10)	700					13,460
			6,715	Apr. 17	(10)	700	
Dec. 12	(6)	550			(11)	1,000	
	(8)	3,500			(13)	240	

Amount of notes of George W. Sias held by the bank at different dates—Con.

Date.	No.	Amount.	Bal. unpaid.	Date.	No.	Amount.	Bal. unpaid.
1900				1900			
Apr. 17	(14)	$550		July 3	(11)	$1,000	
	(15)	2,800			(14)	550	
	(16)	170			(15)	2,800	
	(17)	5,000			(16)	170	
	(18)	3,000			(17)	5,000	
			$13,460		(18)	3,000	
1900					(19)	265	
May 8	(11)	1,000			(20)	700	
	(13)	240			(21)	1,000	
	(14)	550					$14,485
	(15)	2,800		July 13	(14)	550	
	(16)	170			(15)	2,800	
	(17)	5,000			(16)	170	
	(18)	3,000			(17)	5,000	
	(19)	265			(18)	3,000	
	(20)	700			(19)	265	
			13,725		(20)	$700	
May 16	(11)	1,000			(21)	1,000	
	(13)	240			(23)	1,000	
	(14)	550					$14,485
	(15)	2,800		Aug. 14	(15)	2,800	
	(16)	170			(16)	170	
	(17)	5,000			(17)	5,000	
	(18)	2,000			(18)	3,000	
	(19)	265			(19)	265	
	(20)	700			(20)	700	
	(21)	1,000			(21)	1,000	
			14,725		(24)	1,000	
May 24	(11)	1,000			(24)	550	
	(14)	550					14,485
	(15)	2,800		Sept. 4	(16)	170	
	(16)	170			(18)	3,000	
	(17)	5,000			(19)	265	
	(18)	$3,000			(20)	700	
	(19)	265			(21)	1,000	
	(20)	700			(23)	1,000	
	(21)	1,000			(24)	550	
			$14,485		(25)	5,000	
June 12	(11)	1,000			(26)	2,800	
	(14)	550					14,485
	(15)	2,800		Sept. 6	(18)	3,000	
	(16)	170			(19)	265	
	(17)	5,000			(20)	700	
	(18)	3,000			(21)	1,000	
	(19)	265			(23)	1,000	
	(20)	700			(24)	550	
	(21)	1,000			(25)	5,000	
	(22)	150			(26)	2,800	
			14,635				14,315

Wherever it appears in the above tables that a note of a certain amount was replaced on a certain date by another note for the same amount, it appeared in evidence that the former note fell due on or about that date, and was renewed by the latter note. All the notes constituting the paper criticized by the Government, which were time notes, were either paid or renewed at (or in a few cases shortly after) maturity. There was no evidence corresponding to the above in regard to the notes of the other persons enumerated on page 39 [86] except so far as could be inferred from the lists given on pages 73 [121] to 78 [128].

110 PRACTICE AS TO DISCOUNTING OF NOTES.

In connection with the discounting of the notes included in the paper criticized by the Government, evidence was introduced on both sides as to the extent to which it was customary for paper discounted

by the South Danvers Bank to be passed upon by the Board of Directors, and the extent to which the paper criticized by the Government was so passed upon.

The regular meetings of the Board of Directors were held upon Tuesday of each week. The principal business transacted at these meetings was the discounting of notes. It was the custom of notebrokers to come to the bank or send their agents there at the time of the Tuesday meetings and present to the directors paper which they wished discounted. It was also customary at these meetings for the cashier to bring in and present to the directors for ratification notes which had been discounted by the bank in the interval since the last Tuesday meeting. What is now about to be stated in regard to the persons who from time to time acted for the bank in the discounting of notes refers to such notes as were discounted in the intervals between the Tuesday meetings.

It appeared that Section 10 of the By-Laws of the South Danvers National Bank, during all the time covered by the various counts of the indictment, provided as follows:

"There shall be a Standing Committee consisting of the President, Cashier, and one director appointed by the Board for six months to continue to act until succeeded, who shall have power to discount and purchase bills, notes and other evidences of debt, and to buy and sell bills of exchange, and who shall at each regular meeting of the Board make a report of the bills and notes discounted and purchased by them since their last previous report."

Mr. Foster testified that such a committee as is provided for in the By-Laws above quoted was from time to time appointed by the Board of Directors of the South Danvers Bank down to 1878. The last vote by which such a committee was appointed was passed March 11, 1878, when Messrs. Jacobs, Elliott and Clements were appointed such a committee. At that time Mr. Jacobs was president of the bank. In the course of a few years thereafter, between 1880 and 1890, all these persons died or ceased to be connected with
111 the bank. After this committee had passed out of existence as such, the discounting of notes was done by the president of the bank and the cashier. About 1880 or 1889 Mr. Warren Shaw, then a director, acted with the president and cashier for that purpose without any formal appointment. This lasted until about 1896 when Mr. Shaw resigned from the board of directors.

Mr. Foster further testified that during the period when the president, the cashier, and Warren Shaw were attending to the matter of discounts it was not the practice to report all the paper which they had discounted to the board of directors; that paper purchased from notebrokers was regularly so reported; but other paper as a rule was not reported to the directors, and that after the retirement of Warren

Shaw the discounting of notes was done largely by the president, Mr. Clark, and the cashier, Mr. Foster.

It appeared that up to 1891 no record was kept of the doings of the directors at their Tuesday meetings. In 1891 Horace Bushby, one of the directors, began keeping in a book (referred to in the case as the Bushby Record Book) a record of the doings of the directors at those meetings, and continued this practice down to the suspension of the bank. During a considerable portion of this time he was the clerk of the board, but the records of these meetings were not signed or attested. Mr. Bushby, being called as a witness for the Government, testified that this book contained a true record of all discounts passed upon by or reported to the board of directors. The record of each meeting was made on the day of the meeting.

The Government introduced evidence to show what proportion of the notes discounted by the South Danvers Bank from January 3, 1896, to March 26, 1900, and included in the paper criticized by the Government, appeared in the Bushby Record Book as having been passed upon by the board of directors.

According to this evidence one note of John W. Dickinson's for $3,000 appeared in the Bushby Record Book under date of December 28, 1897, and three notes of W. P. Dickinson & Company appeared in the Bushby Record Book, the amounts and dates being as follows: $2,000 October 27, 1896; $5,000 February 9, 1897; $4,000 April 13, 1897. It further appeared that no notes of J. W. Dickinson, trustee, Penacook Manufacturing Company, the Alabama Kaolin Company, Plumbers' Woodworking Company, Foster & Sias, Thorpe, Garratt, Fitch, Schneider, or Sias appeared in the Bushby Record Book between the above dates.

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The defendants introduced evidence to show what proportion of the notes discounted by the South Danvers Bank, other than those discounted for or through the defendant Dickinson, appeared in the Bushby Record Book between January 1, 1897, and April 1, 1900. For this purpose the books of the bank and the Bushby Record Book were examined by the defendant Foster, and his results were examined and compared with the books by the bookkeeper, Frank Taylor. Mr. Taylor's figures differed somewhat from Mr. Foster's. The following shows, according to Mr. Foster's figures, the number of original notes and the number of renewals discounted at the South Danvers Bank during each month of the period above mentioned, as shown by the books of the bank; the number of each kind passed upon by the directors as shown by the Bushby Record Book; the total number of originals and renewals discounted, and the total acted upon by the board of directors. Mr. Taylor, wherever the results of his examination differed from Mr. Foster's, corrected the figures in the fifth and sixth columns, and his corrections appear in parentheses.

Notes discounted at the South Danvers Bank from Jan. 1, 1897, to April 1, 1900, exclusive of those placed there by John W. Dickinson.

Date.	Original notes.		Renewals.		Totals.
	Discounted.	Passed upon by directors.	Discounted.	Passed upon by directors.	Discounted.	Passed upon by directors.
1897.						
Jan.	20	11	34	9	54	20
Feb.	45	16	17	3	62(67)	19(22)
Mar.	51	22	43	12	94	34(36)
Apr.	33	10	35	2	68	12(13)
May.	31	10	32	4	63(64)	14
June.	31	13	26	5	57	18(19)
July.	29	4	43	5	72(78)	9(12)
Aug.	38	20	32	1	70(71)	21(25)
Sept.	35	12	45	4	80(81)	16(19)
113 Oct.	35	2	38	4	73	6
Nov.	35	6	46	6	81(81)	12(16)
Dec.	30	6	28	4	58	10(11)
1898.						
Jan.	23	7	45	3	68	10
Feb.	12	0	45	4	57(58)	4
Mar.	43	8	42	6	85(83)	14(15)
Apr.	21	3	42	0	63(64)	3(4)
May.	23	3	35	2	60	5(6)
June.	25	6	40	3	65(66)	9(10)
July.	23	4	45	1	68	5
Aug.	27	2	28	2	55(57)	4(6)
Sept.	22	1	51	5	73(73)	6(7)
Oct.	38	4	45	1	83	5
Nov.	27	5	43	0	70	5(7)
Dec.	23	2	33	5	56	7
1899.						
Jan.	40	1	42	1	82(81)	2
Feb.	24	2	37	0	61(62)	2
Mar.	17	2	36	2	53(77)	4(7)
Apr.	23	8	37	4	60(63)	12
May.	32	5	51	3	83	8
June.	17	3	20	0	37(49)	3(7)
July.	22	4	48	2	70(71)	6
Aug.	34	10	37	2	71	12
Sept.	19	1	55	1	72(73)	2(3)
Oct.	29	2	47	4	76	6
Nov.	33	4	48	1	81	5
Dec.	24	4	33	2	57	6
1900.						
Jan.	25	2	56	3	81	5
Feb.	13	0	46	0	59	0(1)
Mar.	28	7	61	0	89	7

ENTRIES IN THE BOOKS OF THE BANK.

The evidence here stated under this heading is taken from the testimony of the bookkeeper, Taylor.

The entries which were made in the books of the bank in connection with the payment of checks have already been described. It has already been stated, also, that checks which were not posted to the ledger on the day they came in were kept in the cash
114 drawer, and that the cash drawer also contained unsecured time notes held by the bank, folded inside their wrappers, and arranged in the order of their maturity. The cash drawer was readily accessible to any person behind the counter who might care to look into it.

Demand notes and collateral notes were kept in the vault, which was open into the banking-room during business hours at the bank.

Each collateral note with its wrapper was kept in an envelope with the collateral, and the maker and amount of the note and a description of the collateral were written on the outside of the envelope.

The entries made in the various books in connection with discount of notes remain to be stated. (Mr. Dickinson's checks and notes were, so far as appeared, dealt with in exactly the same way, and the same entries were made in regard to them, and in general the same forms were followed in conducting the business of the bank with Mr. Dickinson as in the case of other customers, except in so far as the contrary may appear from the evidence stated in this bill of exceptions.)

The books at the bank which contained entries connected with the discount of notes were the cash book, discount book, ledger, and two so-called pencil books.

Whenever a note was discounted at the South Danvers Bank it was folded inside a piece of paper called the "wrapper," on which was written the name of the maker, the names of indorsers, if any, the face, discount and proceeds, the date of discount, and date of maturity. The entries as to discounts in the cash book and discount book were made from the notes themselves or the wrappers.

Every note discounted was entered in the cash book in the course of the same day, the entries showing the name of the maker, the face of the note, the date, the name of the person for whom the note was discounted, and the amount of the discount. If the proceeds of the discount were credited to a depositor, there also appeared in the cash book an entry stating the name of the depositor, and the amount so credited.

At intervals of several days the discount book was posted up by entering in it all the notes which had been discounted by the bank during the period since the book was last posted up. The entries in the discount book included the name of the maker, the names
115 of indorsers, if any, the time the note had to run from the date of discount to the date of maturity, the face of the note, the amount of the discount, the amount of proceeds, and the date of maturity. If it was a demand note that fact was indicated; if it was secured by collateral that fact was also indicated. When any note so entered was paid or renewed, it was marked "p" opposite the above entries in the discount book.

When the proceeds of a note discounted were credited to the account of a depositor, the amount of such credit appeared among the other credits in the ledger on the same day.

There were two so-called pencil books, one of which was called in the case the big pencil book, and the other the thin pencil book. The big pencil book was kept by the bookkeeper, Taylor. This book contained a list of the notes held by the South Danvers Bank, all those of one maker being grouped together under that maker's name. Whenever the discount book was posted up as above described, all the items so entered in the discount book were also entered in pencil

in the big pencil book under the names of the makers. Whenever a note was paid or renewed, the entry relating to that note in the big pencil book was erased, the book being used in that respect like a slate. The entries in this book showed the amounts of notes, the indorsers, whether or not there was collateral, and the date of maturity. As often as this book was posted up it showed, under the name of each maker, a corrected list of all notes of that maker held by the bank, with their amounts. The big pencil book showed the amounts of contingent as well as direct liability.

The thin pencil book contained very much the same things as the big pencil book. It was kept almost entirely by Mr. Foster for his own information, was not complete, and did not in all cases show contingent liability as well as direct.

The thin pencil book was taken in to the Tuesday meetings and occasionally referred to when notes were offered for discount.

This book was put in evidence by the defence at the trial. It appeared that at that time it contained notes amounting altogether to $342,847.85. There was no evidence as to the total amount of notes held by the bank at the date when the thin pencil book was last posted up, except so far as could be inferred from the evidence
116 showing that on March 26, 1900, the bank held notes discounted to the amount of $492,094.09.

Of the amount just stated as appearing in the thin pencil book, $100,403.05 represented, according to the testimony of the bookkeeper, Taylor, notes discounted through Mr. Dickinson. Of this amount $50,490 was paper criticized by the Government, the makers and the total amounts of their notes being as follows: John W. Dickinson, $5,000; W. P. Dickinson & Company, $11,275; Penacook Manufacturing Company, $10,000; Foster & Sias, $3,200; Fitch, $8,500; Garratt, $2,000; Sias, $5,515; Schneider, $3,000; Thorpe, $2,000. It appeared that on March 26, 1900, the total amount of notes held by the bank which had been discounted through Mr. Dickinson was $181,161.09, and on March 19 the total amount criticized by the Government was $116,760.

During the day, while the bank was doing business, the various books of the bank were readily accessible to anyone behind the counter. Those used most frequently, such as the cash book, journal, and ledger, were on desks or tables in the space behind the counter; some of the books which were used less often were kept in the book vault except when they were actually in use. The book vault was on the same floor with the banking room, opened into it, and was kept open during the day. The directors of the bank were free to come behind the counter and look at the books whenever they chose. They were free to open the cash drawer and examine its contents whenever they were so disposed, and there was nothing to prevent their doing so. The same is true in regard to the money vault and the book vault. The two pencil books were usually lying about the bank somewhere where they were readily accessible.

President Clark was in the habit of coming into the bank almost every morning. On Wednesdays and Saturdays he was accustomed to leave in time to catch the nine o'clock train for Boston; on other days he frequently remained longer. Banking hours were from eight o'clock to one. While there he was accustomed from time to time to look over the books, especially the ledger, and occasionally the journal, and to talk over the bank's business with the cashier. Mr. Bushby, one of the directors, occasionally came into the bank at other times besides the Tuesday meeting, but not very frequently.
117 He always attended the Tuesday meetings. Mr. Clark, Mr. Whidden, Mr. Foster, and Mr. Rice attended practically all those meetings; Mr. Poole attended only a small proportion of them. These meetings were held at eight o'clock in the morning in the directors' room, back of the banking room. At the time of such meetings, Mr. Clark and Mr. Bushby usually came into the banking room behind the counter, and Mr. Rice and Mr. Whidden occasionally did so. Mr. Clark from time to time asked questions of the employés of the bank as to the bank business, which, so far as Mr. Taylor knew, were always readily answered.

SEMI-ANNUAL EXAMINATIONS AND DIVIDEND DAYS.

It further appeared from the testimony of Mr. Taylor and from the books of the bank that examinations of the bank by the directors were made and dividends declared in March and September, the books of the bank being closed for that purpose on the 24th of March and the 24th of September. If those days fell on a Sunday or a holiday the books were closed on the next preceding business day. The examination was held and the dividends declared on the next business day after the closing of the books.

It further appeared from Mr. Taylor's testimony that on the day when the books were closed in preparation for these dividend days, it was customary, whenever there were in the bank demand notes which had been discounted and the proceeds credited to a depositor, to charge against the account of such depositor interest upon such demand note from the date when it was discounted, or, if it had been in the bank since the previous dividend day, interest for the six months just past. At the same time, in the case of Mr. Dickinson's account, interest was charged against him on all his overdrafts which had occurred during the preceding six months for the period during which each such overdraft had existed. This was done regularly before every dividend day from the time when Mr. Dickinson's account was opened until the last dividend day before the suspension of the bank. The same course was followed with overdrafts of any other depositor. There were very few demand notes at the bank and very few overdrafts except Mr. Dickinson's. In three or four instances referred to in the testimony when Mr. Dickinson
118 sent to the bank checks on a Boston bank which were held at the South Danvers Bank until there should be funds at the Boston bank to take care of them, interest on the amount of these

checks for the period they were held by the South Danvers Bank was charged against Mr. Dickinson's account in making up the books before dividend days.

It appeared in evidence introduced by the Government that the books were made up for the purpose of the directors' examination and the declaration of dividends on September 23, 1899, and on March 24, 1900. On those dates the following charges were made against Mr. Dickinson in the journal, in Mr. Taylor's handwriting:

Sept. 23, 1899.

Interest on Plumbers Woodworking Co	$6,000	1 Mo.	$30	Demand.
" " J. W. Dickinson, Trustee	6,000	3 Mo.	90	"
" " J. W. Dickinson, Trustee	2,200	6 Mo.	66	"
" " J. W. Dickinson, Trustee	800	6 Mo.	24	"
" " L. H. Schneider	3,500	6 Mo.	105	"
" " L. H. Schneider	2,000	6 Mo.	60	"
" " J. W. Dickinson	7,500	6 Mo.	225	"
" " J. W. Dickinson	1,000	6 Mo.	30	"
" " W. P. Dickinson & Co	1,500	1 Mo. 28 ds.	14.50	"
" " W. P. Dickinson & Co	750	4 Mo.	15	"
" " Penacook Mfg. Co	5,000	6 Mo.	150	"
" " Alabama Kaolin Co	1,325	6 Mo.	39.75	"
" " P. W. Elliott	500	6 Mo.	15	"
" " R. C. Metcalf	600	6 Mo.	18	"
Interest due on check $4,000, 3 mo	75			
" " " " 5,000, 3 "	60			
" " " " 1,800, 3 "	27			

March 24, 1900.

6 mo. Int. J. W. Dickinson, tr	$6,000	Demand.	$180
6 " " J. W. Dickinson, tr	800	"	24
6 " " J. W. Dickinson, tr	2,200	"	66
6 " " J. W. Dickinson	1,000	"	30
6 " " J. W. Dickinson	7,500	"	225
6 " " L. H. Schneider	2,000	"	60
6 " " L. H. Schneider	3,500	"	105
5 " " Foster & Stas	3,200	"	80
6 " " Plumbers' Woodworking Co	6,000	"	180
6 " " Alabama Kaolin Co	1,325	"	39.75
6 " " P. W. Elliott	500	"	15
6 " " R. C. Metcalf	600	"	18
6 " " Penacook Mfg. Co	5,000	"	150
2 " " P. Dickinson & Co	1,500	"	15
10 " " W. P. Dickinson & Co	750	"	37.50
Int. J. W. D. on memorandum check overdrafts			600
			$1,825.25

119 All the items above under March 24, 1900, which are marked "Demand" represented interest on demand notes, the names of the makers of such notes appearing in the entries as given above.

Prior to the March, 1900, examination of the bank, there had been for three of four months carried in the cash drawer a check of Dickinson on a Boston bank for $5,000. The day before the March examination this check was returned to Dickinson by Foster's directions through Dodge, and one dated on or before March 24, 1900, for $7,891.20 was substituted, the difference of $2,891.20 being credited to Dickinson's account.

As to this transaction, Mr. Dickinson testified as follows:—

Some time before March 24, 1900, Mr. Dodge came to Mr. Dickinson's office, as he had frequently, and asked Mr. Dickinson for some money, and Mr. Dickinson said that he had a promise of a sale of some bonds which would go through in a few days, and he would then give the bank $4,000 or $5,000 or more. Mr. Dodge said, "You

would better give me a check for it now, then you won't forget it." Mr. Dickinson objected, but Mr. Dodge said, "We won't use the check until you report that the sale has gone through, and that you have deposited the money." Mr. Dickinson finally gave him the check on that understanding. This was a check for $5,000 on a Boston bank, Mr. Dickinson thought it was the Hamilton. So far as Mr. Dickinson knew, he never received any cash equivalent. Mr. Dodge took the check to the bank. At some time later, the check never having been cashed, Mr. Dodge came into Mr. Dickinson's office again and said that the check was torn, and he wanted a new one to replace it. The bond sale was still hanging along. A dispute arose as to the size of the check, and finally Mr. Dickinson gave Mr. Dodge a blank check to be filled out for the correct amount. Later Mr. Dickinson saw the new check, which had been filled out for an amount larger than $5,000 (Mr. Dickinson did not remember the amount), and told Mr. Dodge that he had no business to fill it out for that amount.

Mr. Dickinson testified that he did not know until just before the trial that his account was credited with the difference between the two checks, and had no understanding with any person connected with the bank that that should be done.

120 The directors' examination began at or about eight o'clock in the morning and usually lasted from two hours to two hours and a half. They were held in the directors' room at the bank.

Mr. Taylor testified on cross examination that in preparation for the bank examinations either he or Dodge would make up a statement of the amount of cash in the bank, including currency and checks on other banks not yet collected. If there were any checks drawn by depositors in the South Danvers Bank which had not been entered against the depositor's account in the ledger, such checks would be included in this statement of cash. Either he or Dodge or the cashier would also prepare a list of the amounts of notes held by the bank. The amounts of collateral notes were listed separately. These lists showed only the face amounts of the notes and the total amount of the notes. On the morning of an examination he helped carry all the cash and notes and collateral held by the bank and also the wrappers of any notes which had gone forward for collection into the directors' room. If there were any checks which were held over in the drawer they went in as part of the cash. He (Taylor) remained in the room while the cash was counted by the directors and found to tally with the list which he or Dodge had made up. He then took the cash out of the room to carry on the day's business and was not present during the remainder of the examinations. He never received any orders to keep anything out of the directors' room, and all the notes, the wrappers of notes which had been sent forward for collection, and the cash went in to the directors' room.

The manner in which these examinations were conducted was shown by the testimony of Messrs. Bushby, Whidden and Rice,

directors of the bank, and is set forth in their testimony which is given hereafter.

The amounts of notes placed at the South Danvers Bank by Mr. Dickinson which were held by the bank at the dates of the semi-annual examinations in September, 1898, March and September, 1899, and March, 1900, are shown in the following lists. These lists include both the paper criticized by the Government and all other paper placed at the bank by Mr. Dickinson. The lists as given below were prepared from the books of the bank by coun-
121 sel for Mr. Foster and were verified by the bookkeeper, Frank Taylor, who testified that he compared them very carefully with the books and found them correct.

[The first column contains the names of the makers, and the second column the amounts. The third column contains the names of indorsers, if any, and in case of collateral the abbreviation "Coll." The fourth column shows the date of maturity. In case of demand notes the date of the note is placed in the third column.]

List of notes held by bank Sept. 26, 1898, placed there by John W. Dickinson.

Maker.	Amount.	Endorsers, etc.	Maturity.
Highland Foundry Co	$2,000	W. H. Towne and P. W. Elliott	Oct. 10-98
R. O. Metcalf	600	J. W. Dickinson	Demand.
Mary E. Oakley	300		Sept. 26-98
H. L. Traphagen	700	J. W. Dickinson	Oct. 15-98
T. W. Spencer	500	J. W. Dickinson	Dec. 10-98
P. W. Elliott	500	(June 30-98)	Demand.
J. W. Dickinson, trustee	800	(June 28-98)	Demand.
S. A. F. Whipple	450	A. C. Simpson	Sept. 25-98
Chas. E. Davis	400	Lillian Davis	Oct. 1-98
D. H. Fitch	5,000	Coll. J. W. Dickinson	Oct. 21-98
W. A. Garratt	340.20		Dec. 29-98
M. F. Davis	225	J. W. Dickinson	Jan. 5-99
Highland Foundry Co	1,250	W. H. Towne and P. W. Elliott	Oct. 27-98
Alfred H. Blackmer	500	Coll	Jan. 11-99
Mary E. Oakley	107		Oct. 18-98
Geo. W. Elliott	650	Coll. W. H. Towne	Jan. 20-99
Geo. W. Silas	550		Feb. 10-99
Chas. E. Davis	550	Lillian Davis	Oct. 1-98
Chas. E. Davis	150	J. W. Dickinson	Oct. 5-98
Louis H. Schneider	275		Oct. 21-98
Mary Parsons Foster	1,100		Oct. 25-98
J. W. Dickinson, tr	1,000		Nov. 1-98
Edwin W. Gay	2,000	Coll	Nov. 8-98
Penacook Mfg. Co	1,000	P. J. Baker	Jan. 30-99
Josephine A. Owens	500	Coll	Dec. 18-98
Penacook Mfg. Co	2,000	P. J. Baker and J. W. Dickinson	Jan. 11-99
Penacook Mfg. Co	2,000	P. J. Baker and J. W. Dickinson	Feb. 10-99
John W. Dickinson	2,000	Coll	Nov. 5-98
Highland Foundry Co	1,250	W. H. Towne and P. W. Elliott	Dec. 1-98
122 John W. Dickinson	3,000	Coll	Dec. 27-98
W. P. Dickinson	1,250	Coll	Jan. 5-99
David H. Fitch	850	J. W. Dickinson	Jan. 30-99
Carl Findelsen	2,575	Coll. Jas. L. Clark	Feb. 26-99
Carl Findelsen	2,575	Coll. Jas. L. Clark	Feb. 26-99
Geo. W. Silas and Geo. W. Foster	830		Oct. 10-98
Gertrude H. Dickinson	1,000		Dec. 15-98
Walter H. Thorpe	2,000		Jan. 6-99
W. P. Dickinson & Co	4,000	Coll	Jan. 12-99
John W. Dickinson	2,000	Coll	Jan. 16-99
W. H. Towne	500	C. C. Towne and John W. Dickinson.	Mar. 15-99
Highland Foundry Co	2,000	W. H. Towne and P. W. Elliott	Mar. 20-99
Louis H. Schneider	2,000	(Sept. 13-98)	Demand.
J. W. Dickinson, tr	2,200	(Sept. 13-98)	Demand.
F. J. Shepard and G. K. Bartlett	1,500	Coll	Jan. 10-99
E. A. Phippen	250	J. W. Dickinson	Jan. 22-99
Louis H. Schneider	3,000		Feb. 21-99
James L. Clark	3,000	Coll	Feb. 23-99
	93,393.20		

List of notes held by bank March 25, 1899, placed there by John W. Dickinson.

Maker.	Amount.	Endorsers, etc.	Maturity.
Louis H. Schneider	$2,000	(Sept. 13-98)	Demand.
J. W. Dickinson, tr	2,200	(Sept. 13-98)	Demand.
Alabama Kaolin Co	1,325	(Sept. 29-98)	Demand.
Napoleon J. Holmes	200		Apr. 8-99
Nelson H. Bush	1,500		Apr. 10-99
Highland Foundry Co	1,250	W. H. Towne and P. W. Elliott.	Apr. 22-99
D. F. Flanders	100		Apr. 25-99
Geo. H. Fera	700	J. George Fera	May 4-99
J. W. Dickinson	7,500	(Nov. 21-98)	Demand.
Gertrude H. Dickinson	2,000		May 11-99
Penacook Mfg. Co	5,000	J. W. Dickinson (Nov. 25-98)	Demand.
Highland Foundry Co	1,200	W. H. Towne and P. W. Elliott.	Apr. 30-99
Louis H. Schneider	3,500	J. W. Dickinson (Dec. 3-98)	Demand.
123 G. A. Alexander	235	O. O. Carpenter & W. H. Thorpe.	Apr. 12-99
John W. Dickinson	3,000	Coll	Apr. 27-99
S. A. F. Whipple	350		Apr. 26-99
W. A. Garratt	300		June 26-99
Masonic Temple & Safety Dep. Co	3,000	G. H. Dickinson	Jun. 30-99
Masonic Temple & Safety Dep. Co	1,977.60	G. H. Dickinson	Jun. 30-99
M. F. Davis	225		Jul. 3-99
W. H. Thorpe	2,000		May 3-99
Masonic Temple & Safety Dep. Co	1,545	G. H. Dickinson	Jun. 30-99
A. H. Blackmer	500	Coll	Jul. 11-99
Alabama Kaolin Co	3,100		Mar. 27-99
J. C. Bunnell	200	Warren O. Evans	Apr. 20-99
W. P. Dickinson & Co	1,200	Coll	May 5-99
John W. Dickinson	2,000	Coll	May 10-99
D. H. Fitch	5,000	Coll	May 23-99
Highland Foundry Co	2,000	W. H. Towne and P. W. Elliott.	Jun. 5-99
Josephine A. Owens	500	Coll	Jun. 17-99
Highland Foundry Co	1,169.66	W. H. Towne and P. W. Elliott.	Jun. 18-99
Masonic Temple & Safety Dep. Co	1,030	G. H. Dickinson	Jun. 30-99
Edwin H. Gay	721	Coll. J. W. Dickinson	Jul. 26-99
Mary E. Oakley	424		Jul. 26-99
Gale & Kent	350	W. E. Gale and M. N. Kent	Mar. 28-99
G. H. Morrill	200		Mar. 30-99
Charles E. Davis	1,200	Lillian Davis	Apr. 3-99
S. A. Simpson	500		May 25-99
Arthur G. Brigham	1,000		May 30-99
A. F. Walch	550		May 31-99
D. H. Fitch	800	J. W. Dickinson	Jun. 1-99
Highland Foundry Co	2,000	W. H. Towne and P. W. Elliott.	Jul. 6-99
W. R. Robinson	300	Coyne & Delaney	May 15-99
		Penacook Mfg. Co.	
Geo. W. Sias	550		Aug. 10-99
Bell Mfg. Co	160.69	Penacook Mfg. Co	Mar. 27-99
Louis H. Schneider	3,000		Jun. 24-99
Highland Foundry Co	1,000	W. H. Towne and P. W. Elliott.	Aug. 7-99
The E. S. Wheeler Co	350	Penacook Mfg. Co	May 29-99
123 Carl Findeisen	2,575	Coll. Jas. L. Clark	Aug. 25-99
Carl Findeisen	2,575	Coll. Jas. L. Clark	Aug. 25-99
W. H. Towne	500	Georgia C. Towne	Sep. 15-99
Highland Foundry Co	2,000	W. H. Towne and P. W. Elliott.	Sep. 18-99
Penacook Mfg. Co	2,500		Jun. 2-99
Penacook Mfg. Co	2,500		Jun. 12-99
Herbert H. Blake	3,000	Coll	Jun. 23-99
W. P. Dickinson & Co	3,275		Jun. 29-99
W. A. Garratt	3,000	Coll	Jul. 6-99
Alabama Kaolin Co	3,100		Jul. 27-99
P. W. Elliott	1,200		Aug. 1-99
Geo. W. Sias	3,500	Coll	Aug. 15-99
	100,793.95		

List of notes held by bank Septe[illegible] 25, 1899, placed there by John W. Dickinson.

Maker.	Amount.	Endorsers, etc.	Maturity.
Napoleon J. Holmes	$150		Oct. 10-99
Edwin W. Gay	900	John W. Dickinson	Oct. 9-99
Highland Foundry Co	1,250	W. H. Towne, P. W. Elliott.	Oct. 22-99
James L. Clark	4,000		Oct. 15-99
George H. Fera	700	J. George Fera	Nov. 4-99
Highland Foundry Co	2,000	W. H. Towne, P. W. Elliott.	Oct. 8-99
Highland Foundry Co	1,000	W. H. Towne, P. W. Elliott.	Sep. 28-99
J. W. Dickinson	3,000	Coll	Sep. 27-99
D. F. Flanders	90		Oct. 25-99
C. K. Mayo	800	Coll	Nov. 5 & 6-99
James L. Clark	1,030		Nov. 15-99
D. H. Fitch	5,000	Coll	Sep. 23 & 25, 1899
Henry W. Woodbridge	1,500	E. M. Woodbridge	Nov. 26/27, 1899

List of notes held by bank September 25, 1899, etc.—Continued.

Maker.	Amount.	Endorsers, etc.	Maturity.
Highland Foundry Co	$2,000	W. H. Towne, P. W. Elliott	Nov. 6-99
Chas. E. Davis	1,250	Lillian Davis	Oct. 3-99
Penacook Mfg. Co	2,500		Oct. 2-99
D. H. Fitch	850		Oct. 1-2-99
T. W. Spencer	500	J. W. Dickinson	Dec. 11-99
Highland Foundry Co	1,150	W. H. Towne, P. W. Elliott	Dec. 19-99
Highland Foundry Co	1,250	W. H. Towne, P. W. Elliott	Nov. 15-99
125 W. P. Dickinson & Co	$3,000	Coll	Oct. 15-99
Penacook Mfg. Co	2,500		Oct. 12-99
J. W. Dickinson, tr	6,000	(June 13-1899)	Demand.
Josephine A. Owens	500	Coll	Dec. 19-99
Louis H. Schneider	3,000		Oct. 20-99
M. F. Davis	238.56		Jan. 3-000
Masonic T. & S. D. Co	1,030.33	G. H. Dickinson	Dec. 30/1, 1900
" "	3,091	G. H. Dickinson	Dec. 30/1, "
" "	1,978.24	G. H. Dickinson	Dec. 30/1, "
" "	1,545.50	G. H. Dickinson	Dec. 30/1, "
W. A. Garratt	381.60		Dec. 29-99
Highland Foundry Co	2,000	W. H. Towne	
		P. W. Elliott	Dec. 6-99
A. W. Bond & Co	210		Nov. 5-6/99
W. A. Garratt	3,000	Coll	Nov. 6-99
W. P. Dickinson & Co	3,275		Oct. 28,30,1899
Herbert H. Blake	3,000	Coll	Oct. 23-99
Foster & Sias	3,200		Nov. 21-99
Edwin W. Gay	721	J. W. Dickinson & Coll	Jan. 26-00
P. W. Elliott	2,500		Dec. 31-99
W. P. Dickinson & Co	3,500	Coll	Nov. 30-99
Ala. Kaolin Co	3,100		Nov. 27-99
Mary F. Davis	159		Jan. 31-00
Geo. W. Elliott	625	W. H. Towne & Coll	Jan. 20/22 1900
P. W. Elliott	4,000		Jan. 1-00
Geo. W. Sias	1,000		Dec. 11-99
Plumbers Woodw. Co	6,000	(Aug. 15-1899)	Demand.
Columbus Welston & So. R. R. Co	2,575		Mar. 1-00
Carl Findeisen	2,575	Coll. Jas. L. Clark	Feb. 25-00
Carl Findeisen	2,575	Coll. Jas. L. Clark	Feb. 25-00
Walter H. Thorpe	2,000		Jan. 5-00
Columbus Welston & So. R. R. Co	2,500		Jan. 1-00
S. A. F. Whipple	200		Dec. 26-99
Geo. W. Sias	3,500	Coll	Dec. 15-99
Frank W. Yerxa	500		Oct. 29-99
Ala. Kaolin Co	10,000	(Aug. 31-1899)	Demand.
Geo. H. Fera	398.65		Mar. 5-00
Highland Foundry Co	2,500	W. H. Towne	Feb. 18-00
		P. W. Elliott	
M. W. O'Brien	600		Jan. 22-00
J. W. Dickinson	1,250		Jan. 19-00
Highland Foundry Co	2,000	W. H. Towne	
		P. W. Elliott	Jan. 16-00
126 Gertrude H. Dickinson	1,750		Jan. 11-00
Foster & Sias	3,000		Jan. 8-00
A. W. Bond & Co	308	J. W. Dickinson	Oct. 31-99
Plumbers Woodworking Company	4,000	Sept. 23, 1899	Demand.
R. O. Metcalf	600	J. W. Dickinson	Demand.
P. W. Elliott	500	(June 30, 1898)	Demand.
J. W. Dickinson, tr	800	(June 28-1898)	Demand.
Louis H. Schneider	2,000	(Sept. 13-1898)	Demand.
J. W. Dickinson, tr	2,200	(Sept. 13-1898)	Demand.
	$137,134.88		

List of notes held by bank March 26, 1900, placed there by John W. Dickinson.

Maker.	Amount.	Endorsers, etc.	Maturity.
Edwin W. Gay	$900	J. W. Dickinson	Apr. 9-00
S. P. Gabriel	600	J. W. Dickinson	Apr. 5-00
E. A. Sanborn	515		Apr. 1/2 "
Frank W. Yerxa	500		Apr. 30-00
James L. Clark	1,000		Apr. 24-00
Highland Foundry Co	1,250	W. H. Towne	
		P. W. Elliott	Apr. 23-00
W. A. Garratt	2,000		May 6/7-00
T. W. Spencer	1,000		May 1-00
Columbus Welston & So. R. R. Co	1,552.50		May 1-00
Mary E. Oakley	500	J. W. Dickinson	May 1-00
George H. Fera	765.95		Apr. 28/30, 1900
D. P. Flanders	90		Apr. 25-00
Highland Foundry	2,000	W. H. Towne	
		P. W. Elliott	Apr. 6-00

List of notes held by bank March 26, 1900, etc.—Continued.

Maker.	Amount.	Endorsers, etc.	Maturity.
George W. Adams	$139.06	M. E. Oakley	
		D. E. Adams	Mar. 29-00
James L. Clark	1,000		May 15-00
U. K. Mayo	800	Coll. J. W. Dickinson	May 5/7/00
Highland Foundry Co	1,250	W. H. Towne	
		P. W. Elliott	Apr. 16-00
	3,200		Demand.
Foster & Sias	500	J. W. Dickinson	Jun. 9-00
T. W. Spencer	1,000		May 18-00
Carlinville Water Co.	2,000	W. H. Towne	
Highland Foundry Co		P. W. Elliott	May 6/7/00
	3,500	Coll.	Mar. 30-00
W. F. Dickinson & Co	3,100		Mar. 27-00
Ala. Kaolin Co.	1,150	W. H. Towne	
127 Highland Foundry Co		P. W. Elliott	Jun. 19-00
	1,000		Jun. 11-00
George W. Sias	3,000	Coll.	Apr. 16-00
George W. Sias	262		Apr. 4-00
R. A. Connell	224.72		Jul. 6-00
M. F. Davis	2,000		Jul. 5-00
W. H. Thorpe	3,000		Jul. 2-00
D. H. Fitch	3,000	G. H. Dickinson	Jun. 30/1/00
Masonic T. & S. D. Co	1,030	G. H. Dickinson	Jun. 30/1/00
Masonic T. & S. D. Co	2,500		Jun. 1-00
P. W. Elliott	4,000		Jul. 3-00
P. W. Elliott	500	Coll.	Jun. 19-00
Josephine A. Owens	240		May 23-00
Geo. W. Sias	1,250		May 21-00
J. W. Dickinson	2,000	W. H. Towne	
Highland Foundry Co		P. W. Elliott	May 16-00
	1,700		May 11-00
G. H. Dickinson	350		Apr. 20-00
A. W. Bond & Co	6,000		Jul. 31-00
W. H. Thorpe	721	Coll. J. W. Dickinson	Jul. 26-00
Edwin W. Gay	1,545.50	G. H. Dickinson	Jun. 30/1/00
Masonic T. & S. D. Co	1,978.24	G. H. Dickinson	Jun. 30/1/00
Masonic T. & S. D. Co	3,000	Coll.	Jun. 29-00
J. W. Dickinson	3,500		Jun. 15-00
D. H. Fitch	1,200	Lillian Davis	May 30/31, 1900
Chas. E. Davis	5,000	Coll.	May 25-00
D. H. Fitch	325	Victor J. Emery	Dec. 4-00
Henry N. Libbey as trustee	3,700		Aug. 16-00
James L. Clark	4,000		Aug. 13-00
Penacook Mfg. Co	4,000		Aug. 10-00
J. W. Dickinson, tr.	4,000		Aug. 2-00
Penacook Mfg. Co	1,030		Aug. 2-08
Columbus Welston & S. R. R. Co	2,500	W. H. Towne	
Highland Foundry Co		P. W. Elliott	Jul. 19-00
	550		Aug. 12-00
Geo. W. Sias	2,800		Aug. 20-00
Geo. W. Sias	5,150		Aug. 14-00
Columbus Welston & So. R. R. Co	2,000		Jul. 16-00
Penacook Mfg. Co	4,000		Jul. 2-00
Plumbers Woodworking Company	5,000		Jun. 18-00
Ala. Kaolin Co	170		Sep. 5-00
Geo. W. Sias	2,575.42	Coll. James L. C[illegible]	Aug. 27-00
128 Carl Findeisen	2,575.42	Coll. Jas. L. C[illegible]	Aug. 27-00
Carl Findeisen	3,275		Jul. 28-00
W. F. Dickinson & Co.	200	Lillian Davis	Jul. 13-00
C. E. Davis	300	Charlotte M. Kennedy	Jul. 12-00
Mary E. Oakley	325		Jul. 10-00
R. A. Connell	500		Sep. 17-00
W. H. Towne	2,500	G. C. Towne	
Highland Foundry Co		W. H. Towne	
		P. W. Elliott	Sep. 17-00
W. F. Dickinson & Co	3,000	Coll.	Aug. 14-00
W. F. Dickinson & Co	3,000		Aug. 14-00
A. W. Bond & Co	566		May 1-00
W. S. Butler & Co	267.28	Butler, Bresd & Co.	Mar. 26-00
W. A. Garratt	600		Sep. 14-00
Geo. W. Sias	5,000		Sep. 3-00
John W. Dickinson, tr.	2,000		
John W. Dickinson	2,000	Coll.	Aug. 24-00
Gale & Kent	1,000	W. E. Gale, M. W. Kent	Jul. 23-00
D. H. Fitch	3,500		Apr. 24-00
Flora A. McKenzie	318	J. W. Dickinson	May 21-00
R. C. Metcalf	900	J. W. Dickinson	Demand.
P. W. Elliott	500	(June 30, 1898)	Demand.
J. W. Dickinson, tr.	800	(June 28, 1898)	Demand.
L. H. Schneider	2,000	(Sept. 13, 1898)	Demand.
J. W. Dickinson, tr.	2,200	(Sept. 13, 1898)	Demand.
J. W. Dickinson, tr.	6,000	(June 13, 1899)	Demand.
Plumbers' Woodw. Co.	6,000	(Aug. 15, 1899)	Demand.
Ala. Kaolin Co.	5,000	(Aug. 31, 1899)	Demand.
	$181,161.09		

At each examination a statement of the condition of the bank, which had been prepared by the cashier and written in the Stockholders' Record Book, was presented to the directors, and at the close of the examination such statement was signed by all the directors present. An exactly similar statement was made up in the ledger at the close of every day's business and the statement presented to the directors at the examination was a copy of the statement in the ledger at the close of the previous day's business. These statements were verified by the directors before they were signed, so far as there was means of verification at the examination.

The statements signed at the examination in September, 1898, and March and September, 1899, and March, 1900, were as follows:

129 "Bank Examination. 1898. Monday, September 26th.

We, the undersigned, directors of the South Danvers National Bank, have this day examined said bank, and find the condition of it as follows, as we hereby certify:

Liabilities:		Resources:	
Capital stock	$150,000.00	Legal tenders	$2,600.00
Circulation	45,000.00	Specie	31,100.60
Deposits	184,646.86	Nickels and cents	230.11
Dividends unpaid	2,040.00	Remittances and other cash items	11,994.39
Balance due other banks	65,009.45	Bills of other national banks	771.00
Profits	72,742.45	Balance due from other banks	1,107.81
		Real estate	45,155.86
		Notes discounted	358,528.99
		U. S. bonds	50,000.00
		Stocks	13,700.00
		Treasury U. S	2,250.00
	$517,438.76		$517,438.76

W. P. CLARK,
HENRY G. RICE,
A. H. WHIDDEN,
HORACE BUSHBY."

"Bank Examination. 1899. Saturday, March 25.

We, the undersigned, directors of the South Danvers National Bank, have this day examined said bank, and find the condition of it as follows, as we hereby certify:

Liabilities:		130 Resources:	
Capital stock	$150,000.00	Legal tenders	$4,200.00
Circulation	45,000.00	Specie	29,697.35
Deposits	291,987.46	Nickels and cents	334.48
Dividends unpaid	1,980.00	Remittances and other cash items	20,958.81
Balance due other banks	23,323.14	Bills of other national banks	1[illegible]7.00
Profits	73,559.62	Balance due from other banks	71,398.02
		Real estate	45,130.86
		Notes discounted	347,987.70
		U. S. bonds	50,000.00
		Stocks	13,700.00
		Treasury U. S	2,250.00
	$585,850.22		$585,850.22

W. P. CLARK,
HENRY G. RICE,
HORACE BUSHBY,
A. H. WHIDDEN."

" Bank Examination. 1899. Monday, September 25th, 1899.

We, the undersigned, directors of the South Danvers National Bank, have this day examined said bank, and find the condition of it as follows, as we hereby certify:

Liabilities:	
Capital stock	$150,000.00
Circulation	45,000.00
Deposits	259,243.19
Dividends unpaid	2,022.50
Balance due other banks	47,686.17
Profits	72,059.77
Notes rediscounted	26,500.00
	$602,491.54

Resources:	
Legal tenders	$8,450.00
Specie	29,943.70
Nickels and cents	287.70
Remittance and other cash items	8,890.20
Bills of other national banks	1,052.00
Balance due from other banks	552.64
Real estate	45,105.86
Notes discounted	442,259.44
U. S. bonds	50,000.00
Stocks	13,700.00
Treasury U. S	2,250.00
	$602,491.54

W. P. CLARK,
HENRY G. RICE,
HORACE BUSHBY,
A. H. WHIDDEN.

131 " Bank Examination. 1900. Monday, March 26th.

We, the undersigned, directors of the South Danvers National Bank, have this day examined said bank, and find the condition of it as follows, as we hereby certify:

Liabilities:	
Capital stock	$150,000.00
Circulation	45,000.00
Deposits	231,481.86
Dividends unpaid	2,070.00
Balance due other banks	65,437.24
Certificate of deposit	10,000.00
Profits	72,620.31
Notes rediscounted	67,927.36
	$644,536.77

Resources:	
Specie	$23,086.35
Nickels and cents	154.26
Remittances and other cash items	11,721.86
Bills of other national banks	1,258.00
Balance due from other banks	66.35
Real estate	45,105.86
Notes discounted	492,094.09
U. S. bonds	50,000.00
Stocks	18,800.00
Treasury of the United States	2,250.00
	$644,536.77

W. P. CLARK,
HORACE BUSHBY,
HENRY G. RICE,
A. H. WHIDDEN."

The items of " Profits " in these statements represented not merely the profits of the banking business during the preceding six months but included any surplus which might have been brought over from the preceding six months.

After each of the examinations at which the above statements were signed, the directors held a meeting and declared a dividend. Messrs. Clark, Rice, Bushby, Whidden, and Foster were present at all these meetings. Mr. Poole was present at the meeting in March, 1899. In September, 1898, a semi-annual dividend of three per cent was declared; in March, 1899, September, 1899, and March, 1900, two and one half per cent.

132 TESTIMONY OF DIRECTORS AS TO CONDUCT OF BANK EXAMINATIONS, AND AS TO THEIR KNOWLEDGE OF THE DEALINGS BETWEEN MR. DICKINSON AND THE BANK.

Horace Bushby and Albert H. Whidden, directors of the South Danvers National Bank, were called as witnesses by the Government, and Henry G. Rice, also a director, was called as a witness for the defense.

Mr. Bushby testified regarding his knowledge of the dealings between Mr. Dickinson and the bank and the conduct of bank examinations as follows, on direct examination:

He had been a director of the bank about 20 years. He attended customarily the weekly meetings of the board of directors. He kept the book known as the Bushby Record Book and duly entered in that book the names of the directors who attended the meetings and the notes which were brought before the board for discount. He made the records for each meeting on the morning of the meeting before he left the building. The business customarily transacted at the weekly meetings consisted in the discounting of notes. In the years 1898, 1899, and 1900, prior to March 26, of that year, he had no information that notes signed John W. Dickinson, John W. Dickinson, trustee, W. P. Dickinson & Company, W. H. Thorpe, Penacook Manufacturing Company, Alabama Kaolin Company, Foster & Sias, Plumbers' Woodworking Company, Garratt, Fitch, Schneider, or Sias were discounted on the books of the bank without being submitted to the directors. He had no knowledge or information prior to March 26, 1900, that checks drawn by Dickinson were paid at the bank when he had insufficient funds to his credit at the bank to pay them or that such checks were not charged to his account. Prior to March 26, 1900, he had no knowledge that Mr. Foster was an officer of the Penacook Manufacturing Company, or connected with the Plumbers' Woodworking Company, or was a stockholder or bondholder of the Alabama Kaolin Company or had any business associations with Mr. Dickinson, or that the firm of W. P. Dickinson & Company had dissolved, nor was he told anything prior to March 26, 1900, in regard to Mr. Fitch, Mr. Garratt, or Mr. Thorpe, or Mr. Sias, nor that accommodation notes were dis-
133 counted for Mr. Dickinson. He had seen Mr. Dickinson and heard of his occupation prior to March 26, 1900. He called in at the bank once or twice a week in addition to being present at the weekly meeting. Occasionally he looked at the ledger, but not at the other books or the cash.

At the weekly meetings notes were brought before the directors by notebrokers and the cashier would bring in notes that were left with him. The record book of the directors and the thin pencil book were brought in to the directors' meetings.

There were semi-annual examinations of the bank by the directors in March and September. The examination of September 20, 1899,

which was similar to the other examinations, was conducted as follows:

The clerks brought the specie, the bills and the money drawer, and also a slate with the amount of cash figured up into the directors' room, where the board of directors met. The directors then counted the cash, one man counting the bills, another the silver, another the gold, and another the money drawer. Bushby counted some and then checked the amounts with the figures on the slate to see that they were correct. The cash was then carried back to the banking rooms for the day's business; the slate remained. Then the notes and collateral held by the bank were brought in together with two lists; one of the unsecured notes and the other of the collateral notes. These lists showed only the face amounts of the notes, without other identification of particular notes. The notes were in piles in their separate wrappers. The cashier read off the amount of each note on the back of its wrapper; he then handed the note in its wrapper to one of the directors. Bushby checked the amount of the note on his lists. The maker's name was not called. The notes were called in the order in which they occurred on the lists. The collateral notes were called separately, and the collateral was looked over by the directors together with the note it secured. Bushby did not look at the notes or collateral, as he was busy checking the lists and footing up the columns of figures.

All the notes held by the bank were brought in to the examinations so far as he knew, and there was nothing to prevent any mem-
134 ber of the board of directors seeing the name of every party to the notes or of having the names read.

The cashier then brought in the statement which he had prepared on the condition of the bank made up in the stockholders' book and the directors verified the amounts of cash and notes and then signed the statement.

[The statements so signed for September, 1898, March and September, 1899, and March, 1900, are given above on pages 79 [129] to 81 [131].]

At the meeting of March 26, 1900, the examination was conducted in the same manner with the following exception: Bushby said at the beginning of the meeting that he wanted to know the exact amount of Mr. Dickinson's indebtedness to the bank; and that he was not satisfied with certain things that had come to him of late in regard to the loans of the bank. The cashier then read off the notes as usual, except that when he came to a note which Mr. Dickinson had placed at the bank, whether one of his own or some third person's, he said it was Dickinson paper. Mr. Bushby then set down the amount of such note, and when the notes had all been called, he went into the banking room and got one of the clerks to add up the amount of these notes with the adding machine. They amounted to

$146,000 as nearly as he could recollect. Mr. Bushby then asked Mr. Foster when he loaned Mr. Dickinson all this amount of money. He didn't remember that Mr. Foster said anything. He also asked Mr. Foster if he knew anything about these people, Mr. Dickinson and the others whose notes had been discounted by Mr. Dickinson. Mr. Foster said he knew Mr. Dickinson well and that he was a man of means, and when asked if he thought Mr. Dickinson would pay this amount of money, Mr. Foster said he thought he would pay it if given a little time, but he couldn't pay it right away; if given a little time, he thought there was no doubt Mr. Dickinson could fix it up.

Mr. Whidden asked Mr. Foster why he loaned Mr. Dickinson so much money. Mr. Bushby did not remember that Mr. Foster said anything. Mr. Bushby did not remember that any director told Mr. Foster he had no right to loan this money.

The general guaranty given by Mr. Dickinson of all notes
135 discounted by him at the bank was produced at the meeting.
Mr. Bushby had never seen it before and no one had previously told him of it.

On cross-examination Mr. Bushby testified regarding the foregoing matters as follows:

He first met Mr. Dickinson in 1896 or 1897 at the bank. He came with other notebrokers. He met him on an electric car afterwards. He did not recollect that he appeared before the directors in 1898, but would not say he did not. He remembered he appeared before the directors after the examination of March 26, 1900.

A note of W. P. Dickinson & Company for $5,000 appeared in the Bushby Record Book as discounted February 9, 1897, and another for $5,000 April 3, 1897, and a note of John W. Dickinson's appeared in this book as discounted December 20, 1897. Bushby knew at these times that they were discounted.

He did not know till the last part that the notes discounted at the directors' meetings, of which he kept a record in the Bushby Record Book, formed a small part of all the notes discounted. At each of the semi-annual examinations in the years 1898, 1899, and 1900, he checked off the amount of notes and the totals of the notes, and he therefore knew that on September 26, 1898, the bank held $358,378.99 of notes discounted; on March 25, 1899, $347,989.70; on September 25, 1899, $442,259.44. He never reckoned up the total amount of notes discounted which appeared in the Bushby Record Book and had no idea what the amount was.

No brokers' names were inserted in the Bushby Record Book. No record of special meetings of the directors was made in this book. At several meetings there was no record that any business was transacted and Mr. Bushby said there was none so far as he recollected.

On December 19, 1899, he signed the following letter to a Boston bank:

136 SOUTH DANVERS NATIONAL BANK,
Peabody, Mass., Dec. 19, 1899.

T. C. SINGLETON, Esq., *Cashier.*

DEAR SIR: At a meeting of the directors of this bank, held this day, it was voted that the notes as listed above be sent to the Suffolk National Bank, Boston, Mass., to be held by them as collateral against a temporary overdraft of this bank.

Yours respectfully, HORACE BUSHBY,
Clerk of Board of Directors.

Above on the same page of the letter appeared a letter from Mr. Foster to T. C. Singleton, esq., setting for the list of twelve notes referred to, amounting to $30,652.32. Mr. Bushby said the vote referred to did not appear in the Bushby Record Book because it was passed at a special meeting. Among the list of notes was one of L. H. Schneider. Mr. Bushby said he did not know this note went forward, as he did not examine the list of notes.

In making the bank examinations the directors sat around an oval table about eight feet long and five feet wide. They first counted and checked up the cash; then they took up the notes. The notes were arranged in regular order. Bushby checked off the notes as they were read off. As each note was read off it was put down on the table in front of one of the directors. Bushby did not handle the notes himself. The notes were not discussed while being so called off. A loan of $5,000 or $10,000 was an exception. When such a note was reached on the examination, Bushby did not remember that anything was said by anybody. There was no reason why he should not have had all the information he desired, and he never asked a question without receiving the information requested and he never knew of Foster's refusing to answer a question. All the examinations were conducted in the same manner. The notes secured by collateral were in a separate list. It was short compared with the other list, as the bank did not do much of a collateral business. He never read the outside of the note wrappers.

On October 24, 1899, the directors talked with Mr. Foster about the condition of the bank, which had been called to their attention,
137 but he did not remember that a word was said as to who had the money of the bank at that time.

The latter part of January or the first part of February, 1900, Mr. Bushby asked Mr. Taylor why the bank was so short of funds and had overdrawn its Boston account, and in a day or two Taylor told him that the loan of Dickinson's was too large. He later talked with Foster about the condition of the bank.

At the examination of March 26, 1900, after the total of the loans for which Mr. Dickinson was directly or contingently liable was

ascertained, the directors had a thorough discussion of the matter. They then signed the book in which they certified that the profits for the year were $72,620.31, and then as directors declared a dividend of two and one half per cent.

On March 27, 1900, the directors had a meeting at which the only business transacted was the passing of a resolve in regard to the treasury of the United States. On April 3, 1900, they had another meeting at which they passed a vote authorizing the cashier, Mr. Foster, to obtain from the Suffolk Bank, in his discretion, loans payable on demand or time and the discount of promissory notes, drafts, bills of exchange or other commercial securities of the bank, and to pledge as security therefor the notes or other securities of the bank. This vote was passed in order to get more money from the Suffolk Bank. They also passed a vote ratifying the action of the cashier in pledging certain securities of the bank to the Suffolk Bank to secure an overdraft.

They also voted that all notes discounted or renewed during the past week and all notes falling due the next week be presented to the board. These notes were not brought before the board. No question was at any time raised why this was not done.

Mr. Bushby remembered that Mr. Dickinson came to a directors' meeting some two or three weeks after the March examination and had a general conversation with the directors.

Albert H. Whidden testified regarding the above matters on direct examination as follows:

He had lived in Peabody sixty years and his business was hardware and leather manufacturers' supplies. His place of business was next door to the bank. He had been a director of the bank
138 since 1897. He always attended the Tuesday meetings of the directors. The business commonly transacted at these meetings was acting on such notes as came before the directors for discount. He did not have any information prior to March 26, 1900, that notes signed by J. W. Dickinson, J. W. Dickinson, trustee, W. P. Dickinson & Company, Thorpe, Penacook Manufacturing Company, Alabama Kaolin Company, Foster, Plumbers' Woodworking Company, Garratt, Fitch, Schneider or Sias, were being discounted or entered as discounted on the books of the bank without being brought before the board of directors, or that checks of Mr. Dickinson were paid at the bank and not charged to his account until later, or that notes were discounted at the bank which were accommodation notes, nor did Mr. Foster say anything to him prior to March 26, 1900, about Fitch, Schneider, Garratt, Plumbers' Woodworking Company, Foster, Sias, Alabama Kaolin Company, Penacook Manufacturing Company, Thorpe, W. P. Dickinson & Company, J. W. Dickinson, trustee, or J. W. Dickinson. He had not been told by Mr. Foster prior to March 26, 1900, that Foster was interested in the Penacook Manufacturing Company, in the Alabama Kaolin Company, or in

the Plumbers' Woodworking Company, nor had Mr. Foster had any talk with him with respect to his relations with Mr. Dickinson.

He went to the bank about once a day to do his own banking business, and occasionally to sign a quarterly report. He usually looked at the ledger or book of daily balances about two or three times a month for his own information.

He saw the thin pencil book in the directors' room and referred to it to see what notes of certain persons were held by the bank.

The bank examinations were conducted as follows:

The directors met at about half past seven. They first counted the cash, one director taking the bills, another the silver, and another the gold, and when they were added up they verified the amounts with the amounts written on the slate. The notes were then brought in. Mr. Foster stood at one side of the table at the right of President Clark and called off the amount of the notes one at a time. As he called off the amount of the first note, he handed it to the president, Mr. Clark; the next note he handed to the witness, Mr. Whidden, he being next in order at the table, and the third note he
139 handed to Mr. Rice at the end of the table and so on. The collateral notes were examined last. The collateral notes were kept with the collateral in large envelopes, which were passed to the directors, and when the directors opened the envelope to see the note they would see that the collateral was with the note and was sufficient to cover the note and corresponded with the amount written on the outside of the envelope. Mr. Foster called off the amount of the collateral at the same time he called off the amount of the note. Mr. Bushby checked off the amounts of the notes as they were called off and added up the figures. These figures were then compared with the figures in the statement of the condition of the bank which was written in the stockholders' book.

The notes so handed around by Mr. Foster were kept in folded pieces of paper, which were called wrappers, and on the outside of the wrappers was written the amount of the note and a description of it. As a note was handed to a director he would open the wrapper and read the amount of the note and see if it corresponded with the wrapper and often would read the name of the maker of the note.

All the examinations in 1897, 1898, and 1899 were conducted in the same way.

The examination on March 26, 1900, was conducted in the same way, except that when Mr. Foster started to read off the notes as usual, Mr. Bushby said, "This is not according to our agreement. We have got to have every note read off that had any connection with Mr. Dickinson." Mr. Foster then read off the notes as usual, except that he read off the names of the makers of the notes, and when he came to a note which came to the bank through Mr. Dickinson he said so, and Mr. Bushby put such notes down on a separate piece of paper. Mr. Bushby had this list added up in the adding machine and reported the amount. The witness, Mr. Whidden, then said,

"Gentlemen, we now know where our money has gone." He also said, "How in thunder, George, did you let Dickinson have so much of our money?" Foster made no reply to this question.

Mr. Whidden testified on cross-examination regarding the foregoing matters as follows:

He saw Mr. Dickinson at the bank in 1897 or 1898 at a
140 directors' meeting. When he arrived he found Mr. Dickinson there with Mr. Clark and Mr. Rice. He was not sure whether Mr. Bushby was present. Mr. Dickinson stayed through the meeting, being there about an hour.

He knew, during all the period prior to the meeting of March, 1900, that Mr. Dickinson was doing business with the bank, and heard his name spoken of there.

He knew the bank had a daily ledger book, a cash book, and the thin pencil book. The latter he saw the other directors consult in the directors' room, and he consulted it himself. He knew the bank had two vaults—one for papers and one for books. The vaults were always open and the cash drawer usually open when he went behind the counter. He was always informed about anything in the bank that he asked about.

At the bank examinations the directors sat about a table about five feet by ten in size. They first examined the cash. The bills were put in one pile, gold in another, silver in another, and such checks as there were in another. After the cash had been counted, the notes were brought in together with the collateral. He (Mr. Whidden) sat at one end of the table; Mr. Rice at the other end; the other directors sat at the sides, except Mr. Foster, who stood up. Mr. Foster called off the amounts of the notes, and as he called each one, placed it in front of a director. The notes were arranged and called in the order of time in which they came due. Each note was handed to the director in the wrapper. The name of the maker, the amount of the note, and the date was on the outside of the wrappers. When a note was handed to the witness he looked at the amount on the outside of the wrapper to verify it. In looking at the amount of the note on the wrapper he couldn't avoid seeing the name of the maker of the note.

He then opened the wrapper to see that the note corresponded with the description on the outside. The notes were placed in the wrappers, right side up, so that in so opening the wrapper he could see the whole note. If it was an Alabama Kaolin Company note he could see it was signed Alabama Kaolin Company, John W. Dickinson, President. If the note were a Penacook Manufacturing Company
note he could see it was signed Penacook Manufacturing
141 Company, P. J. Baker, president, John W. Dickinson, treasurer. As to certain of the Plumbers' Woodworking Company notes, he could have seen in so opening them that they were signed Plumbers' Woodworking Company, by George M. Foster, treasurer, John W. Dickinson, president.

If the note was indorsed, it was so indicated on the wrapper, and the witness turned the note over to see that it was indorsed as indicated.

The collateral notes were in large envelopes, together with the collateral. They were handed to the different directors in the same way. The outsides of the envelopes showed the amount and nature of the collateral in each case. The witness first examined the note to see that it tallied with the description on the outside of the envelope, and then examined the collateral to see that it tallied.

If there were any change in the collateral, it was indicated on the outside of the envelope.

The directors did not say a word at these examinations about the notes or collateral held by the bank.

At the meeting of March 26, 1900, after they found the amount for which Dickinson was liable, they talked it over for about two hours. They then signed the statement of the bank's dividends and resources and declared a dividend.

The witness believed at the time of the meeting that Mr. Dickinson was able to pay what he owed. Mr. Clark said at the meeting that he could pay, and Mr. Foster said he could pay, but needed a little time.

The witness knew at the time that Mr. Dickinson was only contingently liable for the greater part of the so-called Dickinson paper.

The directors, during the meeting of March 26, 1900, telephoned to Mr. Dickinson, in order to get him to meet them, but could not reach him. They then instructed the president and cashier to interview him and make an appointment to have him meet them. He did not meet them at the first time they arranged with him, but came two or three weeks later in April. He met Mr. Clark, Mr. Bushby, Mr. Rice, Mr. Foster, and the witness. They had a long interview with him, lasting about four hours. Inquiries were made as to the standing of the various makers of the notes discounted
142 at the bank by Mr. Dickinson, and Mr. Dickinson's accounts, his guarantee, and his overdrafts, were gone into.

After the meeting of March 26, 1900, witness kept track daily of Mr. Dickinson's account and examined the account in the ledger. On the 26th of March, 1900, the ledger showed an overdraft of $175; on the 27th it showed a balance to his credit of $2,761.31; and the 28th there was no balance; on the 29th it showed an overdraft of $2,258.19; on the 30th, $2,509.96; and an increasing overdraft was shown down to May 14. The witness knew of these increasing overdrafts.

The witness said the directors had orally directed Mr. Foster not to let Mr. Dickinson's overdraft be increased, but there was no vote.

On redirect examination Mr. Whidden testified that at the meeting of March 26, 1900, each director in a conversational way expressed a desire to have Mr. Dickinson's account reduced, and said not to allow it to be increased.

He further testified that at the interview between Mr. Dickinson and the directors, held several weeks after the semi-annual meeting of March 26, 1900, Mr. Dickinson was told the total amount for which he was liable to the bank, and that he said he did not think he owed so much.

On recross-examination he testified that about June 19, 1900, Mr. Clark, Mr. Bushby and himself were appointed by the directors a committee to run the bank with the cashier. On the morning of June 21 Mr. Dickinson's account showed an overdraft of $6,849.50. This was increased that day by $480, and was increased subsequently until, on August 8, it stood at $7,810.05. He further testified that at the last interview between the directors and Mr. Dickinson hereinafter referred to, Mr. Dickinson said he would pay up his overdrafts, and he said he would pay what he owed to the bank.

Henry G. Rice, as a witness for the defence, testified regarding the knowledge of the directors of the dealings between Mr. Dickinson and the bank and the conduct of bank examinations as follows, on direct examination:

He became a director of the bank in 1888 or 1889. He attended the Tuesday meetings of the bank regularly. He first met Mr. Dickinson in 1896 or 1897, either in Boston or Peabody.

143 In 1898, 1899 and 1900, he was aware that notes of John W. Dickinson, John W. Dickinson, trustee, W. P. Dickinson & Company, Thorpe, Penacook Manufacturing Company, Foster & Sias, Garratt, Fitch, Schneider and Sias were discounted by the bank. He could not remember about the Plumbers' Woodworking Company.

At the meetings of the board of directors he heard some of this paper discussed and gone over. He knew from the general conduct of the business of the directors that it was there. He thought that prior to March, 1900, some question was asked at a directors' meeting regarding the Alabama Kaolin Company.

He knew in 1899 and 1900 that Mr. Dickinson had overdrafts at the bank. He knew in 1899 that Mr. Dickinson had overdrawn his account at the bank by check. He could not say if he knew this before 1899. The subject of Mr. Dickinson's overdrafts was discussed by the board of directors once, and possibly twice, in 1899. It was discussed in the early summer of 1899, and as a result of these discussions Mr. Dickinson was invited to come down to the bank. Mr. Dickinson did come down in the fall of 1899, and met the board of directors. Mr. Clark, Mr. Bushby, Mr. Whidden and himself were present. He did not remember if Poole was present. The directors and Mr. Dickinson had a general talk as to all the paper which Mr. Dickinson had placed at the bank and as to his overdraft. The interview lasted a hour or so.

Mr. Dickinson attended two other meetings of the board of directors, but he (Mr. Rice) was present at only one of these meetings. He thought they were both in 1900.

He remembered that Mr. Dickinson was present with the directors of the bank on two other occasions outside the bank. Early in 1898

Mr. Dickinson attended the funeral of Mr. Shaw, who had been a director in the bank, and was invited to drive with the directors to the grave, and he drove in the same carriage with the witness and Mr. Whidden, and possibly Mr. Foster. After the Spanish war, in 1898, the witness invited the directors, Mr. Dickinson, and one or two other gentlemen to visit the ship *Vesuvius* at the Navy Yard, at Charleston, and they all attended as guests of Captain Pillsbury.

The witness during the period covered by the counts of the
141 indictment sometimes examined the ledger and the record book of notes. He at times asked Mr. Foster for information as to notes held by the bank and this information was always given him.

The witness attended the bank examinations in 1898, 1899 and 1900. A list of the notes held by the bank was made out before these examinations. The amounts of the notes were called by Mr. Foster or Mr. Clark and checked by Mr. Bushby. Each note after being called was handed to some director. The witness, when handed a note, opened the wrapper which held it and saw that the note existed, who the makers and indorser, if any, were, and verified the inscription on the outside of the wrapper. If he came across a note that he didn't happen to recognize, he put it to one side and afterwards asked who the maker was and where it came from. That was the general custom so far as he knew. He asked information in regard to the notes he did not recognize, sometimes of the president and sometimes of the board, generally. Mr. Bushby and Mr. Whidden occasionally asked questions in regard to notes. The questions regarded the responsibility of the makers of the notes. The notes that were handed to one director were afterwards often placed in the hands of another director.

The notes secured by collateral were examined when reached, the same as the other notes and the collateral was examined at the same time. The witness remembered that at the September, 1898, examination and at the succeeding examinations bonds and stock of the Alabama Kaolin Company were thus examined.

The witness knew in 1898 or 1899 that Mr. Dickinson's general guaranty was in the bank. He saw it once in the directors' room in one of those years. Mr. Bushby, Mr. Clark, Mr. Whidden and Mr. Foster and the witness were present. There was a general discussion respecting it, some of them doubting whether it would hold as a guaranty. The witness was aware previous to the time that this general guaranty came to the bank that occasionally special guaranties were received for special notes.

On cross examination Mr. Rice testified in regard to the above matters as follows:

He was an officer of the Norfolk Manufacturing Company. In 1899
Mr. Dickinson was employed by the Norfolk Manufacturing
142 Company as broker to place its notes, and this relationship continued until 1900, when the company assigned.

He could not say whether any of the notes of J. W. Dickinson, J. W. Dickinson, trustee, W. P. Dickinson & Company, Penacook Manufacturing Company, Alabama Kaolin Company, Plumbers' Woodworking Company, or Garratt, were brought before the board of directors for discount in 1899 and 1900. He should say that notes of Thorpe, Foster & Sias, Fitch, Schneider and Sias were so brought before the board.

He did not remember that before the meeting on March 26, 1900, he had heard anyone ask about the Alabama Kaolin Company. He did not remember that Mr. Foster told him or any person in his presence at the meeting of March, 1900, or at any previous meeting, that he was the treasurer of the Alabama Kaolin Company, or that he was the treasurer of the Plumbers' Woodworking Company or a director of the Penacook Manufacturing Company or interested as a bondholder or shareholder in any of these companies, or that at the meeting in March, 1900, or at any prior meeting that notes of the Penacook Manufacturing Company had gone to protest. He did not remember that he or anyone in his presence asked Mr. Foster at the meeting in March, 1900, or prior thereto, whether the Penacook Manufacturing Company, the Plumbers' Woodworking Company, the Alabama Kaolin Company, Fitch, Foster & Sias or Thorpe were solvent, or that Mr. Foster said anything regarding the financial ability of any of those persons or corporations.

He knew that notes were being discounted by Mr. Foster that were not brought before the board. He got this information in the directors' room from seeing notes brought in after being discounted by the cashier to be ratified by the directors. Foster was allowed to exercise his own judgment as to the discounting of notes of a regular customer as often as a regular customer would wish to have a note renewed or discounted at some time between the weekly meetings of the directors and would not be in a position to wait until such meeting. Mr. Dickinson was regarded as one of the regular customers of the bank.

The witness believed Mr. Dickinson first attended a meeting of the board of directors in 1898. Mr. Clark, Mr. Bushby and Mr.
146 Whidden were present. At this meeting nothing was said about the assets and liabilities of the makers of the notes which Mr. Dickinson discounted at the bank. He could not say whether or not Mr. Dickinson's overdrafts were spoken of.

The next meeting between Mr. Dickinson and the board of directors was in 1899. No statement was made by Mr. Dickinson at that meeting of the assets and liabilities of the makers of the notes discounted by him, nor did the witness then recollect that anything was said about overdrafts.

Once, and possibly twice, in 1899, before the interview between Mr. Dickinson and the directors in the fall of 1899, the subject of overdrafts by Mr. Dickinson was the subject-matter of discussion by the board of directors. The witness could not recollect whether or not this was the first time he knew about these overdrafts and about

checks of Dickinson's being held by the bank. The board of directors said that the overdraft must be cut down and that it must not occur again. He did not know that after this discussion Mr. Dickinson continued to draw checks varying in amount from $3,000 to $4,500 against his account at a time when he had not sufficient funds to meet those checks and that such checks were paid by the bank and not entered in the ledger account.

The witness, during the years 1898 to 1900, examined the thin pencil book to see what loans were outstanding.

On redirect examination he testified that he knew during the period in question that the thin pencil book was faulty and did not contain all the notes discounted.

At the interviews between the board of directors and Mr. Dickinson at which the witness was present, Mr. Dickinson was questioned as to his personal responsibility and as to the business he was doing.

The witness did not remember that the board of directors ever told Mr. Foster not to loan Mr. Dickinson any more money or that Mr. Dickinson should not overdraw his account.

When the witness looked at the thin pencil book he often asked Mr. Foster for information regarding the matters contained in it. This information Mr. Foster never refused.

147 TESTIMONY OF MR. DICKINSON AS TO HIS INTERVIEWS WITH THE BOARD OF DIRECTORS.

Mr. Dickinson testified that he had three interviews with the board of directors at the bank for the purpose of discussing his loan; the first interview being in December, 1898; the second in the spring or early summer of 1899; and the third, according to his recollection, in May or June, 1900. His testimony concerning these interviews was as follows:

First meeting: Mr. Dickinson fixed the time of his first meeting with the directors by the fact that it was not very long after he had given the bank a $7,500 note. (It appeared in evidence that a $7,500 note of Mr. Dickinson's was discounted at a bank in November 22, 1898.) Not very long after this note was discounted Mr. Dickinson met Mr. Clark one Saturday, and Mr. Clark asked him to come down on the following Tuesday to the directors' meeting, saying that the directors would like to talk over Mr. Dickinson's business with the bank. Accordingly Mr. Dickinson attended the meeting on the following Tuesday. He remembered that Mr. Clark, Mr. Bushby and Mr. Rice were present, and he thought Mr. Whidden and Mr. Poole were there. All of the directors present took more or less part in the conversation. Mr. Dickinson did not remember what was said by particular ones.

Mr. Clark opened the discussion by saying that Mr. Dickinson was using considerable of the bank's money, and the directors would like to know what he was doing with it. Mr. Dickinson replied that

he was using it in his note business and was also putting it into different enterprises which he mentioned, viz, the Concord Apartment House, the Alabama Kaolin Company and the Penacook Manufacturing Company.

The directors asked Mr. Dickinson to describe the property of the Concord Apartment House Company and he told them that the company owned a large seven story building in Chicago, 129 feet square, containing 518 rooms; that the building had cost, as he understood it, $350,000 above the ground; that it was capitalized for $300,000 under the laws of Illinois, and bonded for $150,000 in six per cent first mortgage bonds; that the bonds which Mr. Dickinson
148 was selling he had sold practically at par; that W. P. Dickinson & Company had advanced about $75,000 to this company, above the bonds.

The directors also asked about the Alabama Kaolin Company and Mr. Dickinson replied that this company owned practically all the deposits of china clay in Kalb County, Alabama; that it owned a mine known as the Eureka Mine for which Mr. Dickinson understood the Franklin Pottery Company, a former owner, had paid something like $140,000; that the Kaolin Company owned a brick plant at Fort Payne which had cost $145,000, and about four hundred acres some two miles from the city of Fort Payne, on the other side of the town, containing several deposits of clay and a deposit of boxite. Mr. Dickinson said that the clay in the large mine ran along a ridge and that the company's holdings ran over into the State of Georgia, which was said to be about two and one-half miles on the ridge. He also said that he had had two different engineers examine the mine; that one of them had had about twenty-eight years' experience in the business; that according to the report of this engineer the company owned seven million tons of clay in the deposit, and the clay washed was worth from $13 to $16 a ton in the northern market. This expert said the property was worth half a million dollars as a going property, and Mr. Dickinson so told the directors. Mr. Dickinson also told them that the company had built a large washing plant which cost about $35,000. The directors asked how much money Mr. Dickinson had advanced down there after buying the property, and he told them he thought it would run to seventy odd thousand dollars.

Mr. Dickinson told the directors that the Kaolin Company had had an offer some time before from a large concern with ample capital back of it. This concern desired to make a contract to take out 50,000 tons of clay a year for twenty years, and pay the Kaolin Company one dollar a ton royalty; that the Kaolin Company had rejected this offer, because the company expected to make more money by running both plants itself.

Mr. Dickinson also told the directors at their request about the Penacook Manufacturing Company. He told them that he had bought the plant of the assignee of the former owners very cheap; that it was exempt from taxes under this sale, and that it had
149 originally cost at least $140,000; that the price had been reported more than that; that the plant consisted of a large fac-

tory with about ninety machines, some of which had cost as high as $4,000; with water power and a steam plant with a large engine. The directors asked what the company was making and Mr. Dickinson told them plumbers' woodwork. They asked where the goods were sold, and he replied chiefly in New England—that there was a good demand for them. The directors asked Mr. Dickinson if he was making money in his business, and he told them he was. Being asked for an estimate of his income, he said he thought it would be not less than $25,000 a year.

Mr. Dickinson testified that all the statements which he had made to the board of directors at this interview were, to the best of his information and belief, true and correct statements.

Second meeting: Mr. Dickinson testified that to the best of his recollection the next time when he appeared before the board of directors to discuss his business with the bank was in the spring or early summer of 1899. Mr. Clark told him that the directors would like to have another talk with him and asked him to come down to the next meeting, and Mr. Dickinson did so. Mr. Clark, Mr. Rice, Mr. Whidden and Mr. Bushby were present. The conversation was general. Mr. Clark began it by saying that the directors wished to know how Mr. Dickinson's affairs were getting along. Mr. Dickinson replied that the Alabama Kaolin Company had had some trouble with the washing machinery, but they expected to overcome it. They had sent one press away to have the plates ground down, and if that was successful all the presses would be treated in the same way. If the machines could be made to fulfil the guaranty under which they were purchased, Mr. Dickinson said that the company expected to get out thirty tons of clay a day, at a net profit of five dollars a ton; that they had a market at Trenton, New Jersey, and East Liverpool, Ohio, for all the clay they could get out.

Mr. Dickinson also told the directors that he was negotiating a sale of the Kaolin Company with some people in New York and Philadelphia; that he had had different offers for the property and expected to sell it in the course of a few months; and that when
150 he did so he would take up a good part of the indebtedness which he had at the bank.

The directors asked about the Penacook Manufacturing Company and Mr. Dickinson told them that the company was having some trouble with the Knickerbocker Trust Company; that the latter company had repudiated an arrangement made with Mr. Dickinson and was trying to get hold of the Penacook property; that Mr. Dickinson had organized a new company called the "Plumbers' Woodworking Company," and the Penacook Company had leased its plant to the new company under an arrangement fair to all parties, which would protect the property. Mr. Dickinson said that he thought by virtue of this arrangement he could make a settlement with the Knickerbocker people which would be advantageous to the Penacook Company; that he thought there was money in the business and intended

to protect it. He also said that he would stand back of any of the Penacook notes in the bank and see that they were taken care of.

The directors asked how long Mr. Dickinson thought it would take to get these matters in shape and he replied that he thought he would have more of them in shape by the end of 1900. He said that when these enterprises were well started he would bring their accounts to the South Danvers Bank.

The directors asked about the notes of Fitch, Sias and Thorpe, and whether Mr. Dickinson thought the makers were good for the notes. In regard to Fitch, Mr. Dickinson replied that he had guaranteed the notes and would take care of them. He said he thought Sias was good for his notes and told the directors that Sias was in the real estate business. In regard to Thorpe, Mr. Dickinson told the directors that he was a lawyer in Boston; that Mr. Dickinson did not know how much he was worth, but that he bore a good reputation and people said he was honest. Mr. Dickinson added: "If he doesn't pay the notes I will." Mr. Dickinson thought Garratt's notes were also mentioned.

The directors asked him if he considered that he could take care of everything he had guaranteed in the bank, and he replied that he thought he could; that he could not take care of all at once, but by renewing a part of it could cut it down and gradually take it out of the bank.

151 The directors asked Mr. Dickinson if he thought his guaranty was legally binding and he said he did, as it was given for a consideration.

Mr. Dickinson said that he had some bonds out west and that as soon as a sale out there went through he should bring the bonds to the bank to pay off some of his indebtedness there.

Speaking of Mr. Dickinson's enterprises the directors said: "These things are slower than you told us. You thought you were going to put them through right away and that this money would be coming back. We notice you are owing the bank more instead of less and that you have overdrafts." They asked him if he did not have some notes that he did not discount. He replied that he had. The directors said they would rather have him send down notes to be credited to his account than have the account show in red ink, because they did not like to have red ink entries on the books.

The directors also spoke of one or two notes which had gone to protest at the Suffolk bank, where they were sent for collection, and said that the Suffolk bank people had made some talk about it. The directors said they wished Mr. Dickinson to see that notes discounted through him did not go to protest. He replied that the bank ought not to send such notes up for collection; that he did not always have the money to take care of them, and sometimes the makers came in suddenly, perhaps on the very day the note was due, and said that they could not take care of them and wanted to renew them. The directors told Mr. Dickinson not to let the notes go to protest any way, but to use what money he had, and, if he did not have enough

to draw on the South Danvers Bank for the balance to take care of the notes.

Mr. Dickinson testified that in one of his interviews with the directors he told them about a statement which his brother, W. P. Dickinson, had made to one of the commercial agencies, showing the financial responsibility of the firm of W. P. Dickinson & Company. This statement, as nearly as Mr. Dickinson could remember, showed a net worth of about $300,000.

In addition to the interviews with the Board of Directors above described, Mr. Dickinson testified that at another time he had a conversation as to his financial standing with Mr. Clark and Mr.
152 Foster. He thought this was in 1898. He had prepared a statement as to his financial responsibility to be presented to the Shawmut Bank, and he showed this statement to Mr. Foster and talked about it with Mr. Foster and Mr. Clark. The statement contained a memorandum of assets, consisting of real estate, stocks and bonds, and stated the amount of Mr. Dickinson's financial responsibility somewhere in the neighborhood of $150,000.

Third meeting: According to Mr. Dickinson's recollection the third interview with the directors took place in May or June, 1900. As he remembered it, the directors sent word by Mr. Dodge that they desired to see him. Mr. Dickinson agreed to come down and a day was set, but on that day Mr. Dickinson was called out of town and telephoned that he could not come to the bank. About a week later he went down to the bank and attended a directors' meeting. Mr. Clark, Mr. Bushby, Mr. Whidden and Mr. Foster were present.

Mr. Clark began the interview by saying substantially: "Dickinson, you haven't cut down your loan as you said you were going to; instead of your loan getting smaller it has got larger, and we don't like it. We want you to cut this loan down." Mr. Clark also said that Mr. Dickinson had an overdraft of several thousand dollars, naming the amount. Mr. Dickinson did not remember the exact figures. Mr. Clark added that Mr. Dickinson had not done as he agreed in regard to cutting down his loan and overdraft.

Mr Dickinson replied substantially as follows: "I haven't been able to do so because these things haven't materialized as quickly as I thought they would. I will bring them all out, and my loan, I consider, is at high-water mark. These things will turn and I will pay off this loan just as fast as I can." Mr. Dickinson added that he had always paid the bank a good rate of interest, and while at a good many places he had paid only five per cent, he had always paid six there. One of the directors spoke up, and said, "Yes, that is so; you have paid us a good rate and that has helped us to pay dividends." Mr. Dickinson said, "I have never shown any disposition to back out of anything I have said, and I have stood back of all these notes, and I intend to."

Mr. Clark asked him how much he supposed the notes amounted to, and Mr. Dickinson said he thought about $100,000. Mr. Clark

153 replied, "It is nearer one hundred and fifty." Mr. Dickinson said, "I don't believe it is; I don't believe it is all mine. You have charged a number of notes to me that don't belong to me and I believe you have got a good many items there that are not properly charged to me. I don't think the amount I actually owe is anywhere near that." Mr. Clark said that if anything had been improperly charged to Mr. Dickinson they would correct it; that they did not wish him to pay anything he did not honestly owe. Mr. Dickinson replied that he was perfectly willing to pay and take care of all the notes he had put in under his guaranty, and no others.

Mr. Clark then read off from a book the amounts of all the notes on which Mr. Dickinson was directly or contingently liable, according to the directors' figures, and asked Mr. Dickinson about the different makers, and what he knew about their financial responsibility, what business they were in, etc., going through the entire list.

The directors told Mr. Dickinson that the Comptroller had complained about his overdraft and the size of his loan. He did not remember whether they showed him a communication from the Comptroller.

The directors said that the Highland Foundry matter, of which Mr. Dickinson had told them, had not gone through, and that he had a lot of Highland Foundry notes in the bank; that putting bonds on the company had hurt the credit, and they wanted the Highland Foundry notes taken out. Mr. Dickinson said he would do that, that he would also pay the bank, by the first of July, $5,000 or $6,000 on other notes in the bank, and that he would take out some of the other notes which he had placed there.

Mr. Dickinson reminded the directors that in 1897 he had put some notes of Oatman Brothers into the bank; that $5,000 of this paper had been sent out west for collection; that Oatman Brothers had failed, and that Mr. Dickinson had either paid their notes or given other notes in place of them on which he had paid the interest. He said that the estate of Oatman Brothers had not yet been settled, but as soon as it was he should get some money from the $5,000 of notes, and would turn that over to the bank. (Mr. Dickinson testified that at the time he put the Oatman Brothers notes into the bank the firm was rated in a mercantile agency at a very large sum,
154 either $450,000 or $650,000, and was supposed to be a gilt-edged concern.) Mr. Dickinson told the directors that when he placed the Oatman Brothers notes at the bank he understood they were first-class paper, and reminded the directors that he had stood back of them and had given other notes on which the bank had received interest, so that the bank had lost nothing.

Mr. Dickinson also said that he had brought considerable deposits to the bank from different clients and friends of his, saying that he thought the largest deposit they had in the bank was brought there by a friend of his, amounting to $25,000 or $30,000. The depositor referred to was Mr. Huntley, and his name was mentioned in the discussion. Mr. Dickinson also told them that Mr. Gay had put

quite a large sum of money there. He thought he mentioned the sum, which was about $20,000. He said there were $25,000 or $30,000 more in the bank from other friends of his, and that still another had said that he would deposit about $65,000 there which he was not going to use for some time. The directors said they knew Mr. Dickinson had brought deposits to the bank and appreciated it.

He also called attention to the fact that he was a stockholder in the bank to a considerable sum; that he held more than 40 shares. (Mr. Dickinson testified that as a matter of fact he held 43 shares, of which he had bought 10 some time in the winter of 1900, at 102½. The rest he had held for two or three years, having picked it up from time to time. For some of it he had paid 119.)

Mr. Dickinson assured the directors that as soon as he could liquidate various affairs that he was in he would do his best to pay off his loan, and that he was satisfied he could handle it, if given time, so that the bank would not lose a cent.

At the close of the interview the directors said they were glad he had told them frankly all they wished to know, and from what he had said they felt satisfied he could take care of his loan, but that they didn't want an overdraft and the loan must be cut down as soon as possible.

The conversation was general and Mr. Dickinson did not remember what was said by particular directors, except as above stated.

He testified that all he said to the directors at this interview,
155 and also at the preceding ones, was true to the best of his information and belief.

Mr. Dickinson further testified that after the conference he did, in fact, take out some of the notes, including $5,000 or $6,000 of the paper of the Masonic Temple Safety Deposit Vault Company. He also took steps to take some of the Highland Foundry paper out of the bank. In this connection his testimony was as follows:

Some country bank had a certificate of deposit in the South Danvers amounting to $10,000. Some time after the interview with the directors above described, Mr. Clark came to Mr. Dickinson and told him that this certificate of deposit was coming due and must be paid; that the bank was short of money, and if it was not able to pay the certificate would have to close. Mr. Clark asked Mr. Dickinson if he couldn't get the money to help them pay off the certificate, referring to the fact that Mr. Dickinson had promised to take up some of the Highland Foundry notes. Mr. Dickinson thereupon raised $10,000 for the Highland Foundry Company, with which he paid the certificate of deposit at a bank in Boston at which it was made payable. In return for this $10,000, the South Danvers bank gave Mr. Dickinson a $2,500 note of the Highland Foundry Company, which the bank held, and promised to return him notes for the balance of the amount a little later. Mr. Clark explained

that the other Highland Foundry notes had been rediscounted at another bank, and they couldn't get them just then. Mr. Dickinson never received the other $7,500 of Highland Foundry notes. Mr. Clark later explained to him that, after the suspension of the bank, the receiver claimed that the $7,500 which Dickinson had paid in the above transaction was a deposit, and refused to give up the notes.

There was also introduced by the defendant Dickinson evidence tending to show that some charges had been made against his account which were not properly chargeable to him.

LETTERS FROM AND TO THE COMPTROLLER OF THE CURRENCY.

It appeared in evidence that four or five times a year the Comptroller of the Currency called on the South Danvers Bank for a statement of its assets and liabilities; that these statements
156 were not called for on set dates, but the calls came without warning. In response to them statements were prepared, signed by all the directors and mailed to the Comptroller.

Mr. Whidden was asked on cross examination whether or not, after the investigation of the affairs of the bank at the examination of March, 1900, and after the interview between Mr. Dickinson and the directors above described, the bank received a letter from the Comptroller of the Currency, and he replied in the affirmative.

Exception 3: Counsel for the defence then offered in evidence a letter from the Comptroller of the Currency to the president of the South Danvers National Bank, such letter being in the words and figures following:

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
Washington, June 14, 1900.

Mr. WILLIAM P. CLARK,
President South Danvers Nat'l Bank, Peabody, Mass.

SIR: The report of an examination of your bank, made on the 7th instant, has been received and has had careful consideration.

Aside from the fact that a very large proportion of your loans and discounts is made upon single name paper without other security, $38,381.21 is overdue paper, of which $26,418.03 is classed as "bad debts," as defined by section 5204, U. S. R. S. A loss of $22,500 is estimated upon the above paper.

Such of this paper as is good should be collected or made active by renewal, with satisfactory security for payment after a reasonable extension.

The following loans are excessive and should be reduced to the limit prescribed by section 5200, U. S. R. S.

J. W. Dickinson	$15,150.	
" " "	7,438.71	
		$22,588.71
Geo. W. Sias	14,485.	
Foster & Sias	3,200.	
		17,685.

The above loans are of doubtful value. The examiner states that a very large proportion represents accommodations granted to parties interested in real estate operations and the promotion of various manufacturing and industrial enterprises, much of the paper being single name, the makers being of unknown financial responsibility.

157 Overdrafts amounted to $9,040.88, and of this amount $7,438.71 is included in the loan to J. W. Dickinson as above stated. This account is habitually overdrawn and is unsecured. Accommodations should never be granted in this form except in cases of emergency, and security should always be obtained.

The accom'dations granted to J. W. Dickinson, who is a broker in Boston, Mass., and companies in which he appears to be interested, as well as to parties allied with him, among whom is the cashier of your bank, Mr. Geo. M. Foster, amount to $148,167.41. It is thought that considerable loss will ensue upon these accommodations.

The lawful money reserve was deficient $14,295, and the average reserve has been below the requirement for the past three months.

In this connection your attention is called to Section 5191, U. S. R. S., which forbids a national bank to increase its liabilities by making any new loan or discount while there is a deficiency in the required reserve, and provides a penalty for failure to make good the reserve within thirty days. If any shortage now exists in the lawful money reserve you are hereby notified to make it good. Please inform this office when this has been done.

The bank was liable for money borrowed to the amount of $90,780. In addition to this amount, there were two certificates of deposit outstanding as follows:

March 15, 1900, Woodstock Nat'l Bank, Woodstock, Vt	$10,000
June 16, 1900, Nat'l Exchange Bank, Boston, Mass	10,000

The first named certificate bears interest at 5 per cent and the latter at 3 per cent, and they have the appearance of a further liability for money borrowed.

The examiner reports that no register is used for keeping a record of certificates of deposit issued. It is respectfully suggested that a register should be procured for this purpose.

The deficiency in the reserve and the large amount of money borrowed evidence an extended condition of the bank's business, made necessary by the accommodations granted as above stated in which Director and Cashier Foster is interested.

While recognizing the right of directors and officers to borrow within the limitations of law and safety, the Comptroller must insist most rigidly that the directors and others connected with the bank in a fiduciary relation shall not avail themselves of the easy opportunity afforded them to borrow beyond this limit, either directly or indirectly, the funds entrusted to their keeping in order to carry on enterprises outside of the banks with which they were connected.

The continued experience of this office is that such loans in many instances result disastrously to all concerned. The Comptroller must

insist that this condition of affairs be remedied with the least possible delay.

158 The following losses have either been sustained by the bank, or are probable, viz:

"Bad debts"	$20,000
Other overdue paper	2,500
Stocks, securities, claims, etc	5,100
	$27,600

No dividends should be declared until all losses have been ascertained and charged off.

Please bring this communication to the immediate attention of the directors for consideration, and request them to unite in making a prompt reply over their individual signatures.

Respectfully,

T. P. KANE,
Deputy and Acting Comptroller.

Counsel for the defence also offered in evidence a copy of a letter purporting to be written to the Comptroller of the Currency and signed by all the directors of the South Danvers Bank. This paper was in the words and figures following:

SOUTH DANVERS NATIONAL BANK,
Peabody, Mass., June 18th, 1900.

To the COMPTROLLER OF THE CURRENCY:

SIR: In reply to yours of June 14th, 1900, regarding the report of the examination of the bank, would say that a meeting was called and held this day, the president and a full board of directors being present, to consider the report made by your examiner to our president.

We think a loss of $22,500.00 is excessive, and we expect this will be reduced. We also look upon $11,963.18 as good paper.

John W. Dickinson has agreed to meet his overdraft and we shall do all in our power to have this executed.

Excessive loans are being reduced as fast as possible, $1,000 having been paid on Foster & Sias since the examination, reducing that note to $2,200.

We also wish to say that the Foster of the firm of Foster & Sias is not the Cashier of this bank, nor in any way related to him, financially or otherwise.

In regard to our Cashier being interested with J. W. Dickinson, would say that we find that he has no connection with him, except being a Director and Treasurer in two companies in which said Dickinson is interested, he having accepted these positions, expecting to bring business to our bank, and he receives no financial benefit and is in no way liable beyond the stock which he holds.

159 We feel that the examiner is in error in regard to the financial standing of J. W. Dickinson and Geo. W. Sias.

We also have assurances that all overdrafts will be made good as soon as possible.

We will take measures immediately to make the reserve good, and will purchase a register, and comply with the requirements as stated in your report.

Other recommendations and references contained in your letter are duly considered and acted upon, and it is our intention to abide by these recommendations contained in your valuable communication.

Trusting the above will meet the requirements called for, I am

Yours respectfully,

W. P. Clark, *President.*
Horace Bushby,
Henry G. Rice,
George M. Foster,
A. H. Whidden,
Edmund A. Poole,
Directors.

Counsel for the Government objected to the admission in evidence of either of the above letters, but no objection was made on the ground that the second was a copy, and it was admitted by counsel for the Government that the letter from the Comptroller as above set forth was received at the South Danvers National Bank, and that a letter from the directors of the bank, in the terms above set forth, and signed as above, was mailed to the Comptroller. Counsel for the defence contended that these letters were admissible in evidence to contradict certain of the testimony of Mr. Bushby and Mr. Whidden, above stated, in regard to their attitude toward Mr. Dickinson's account after March, 1900; and as showing ratification and approval by the directors of Mr. Foster's acts in connection with the discount of notes for Mr. Dickinson; and as tending to show the state of mind of the directors toward Mr. Dickinson's account after their investigation in March and April, 1900.

The presiding judge sustained the objection of counsel for the Government, and declined to admit either of the letters in evidence.

The defendant Dickinson, by his counsel, duly and seasonably excepted to the refusal to admit each of these letters in evidence, and his exceptions were duly noted.

Exception 4: At a subsequent point in the trial, during the
160 direct examination of the defendant Dickinson, by his counsel, Mr. Dickinson was shown a copy of the above-mentioned letter to the Comptroller of the Currency and asked if he recognized the contents from memory, and he replied that he did. Mr. Dickinson then testified that in June, 1900, he had a conversation with Mr. Clark, president of the South Danvers Bank, during which Mr. Clark exhibited to him an original letter to the Comptroller of the Currency, of which the paper just shown to Mr. Dickinson was a copy, and that at that time Mr. Dickinson discussed with Mr. Clark the

contents of that letter. Counsel for the Government waived any proof that the original letter was mailed.

Counsel for Mr. Dickinson then offered in evidence a letter-press copy of the letter as to which Mr. Dickinson had just testified, such copy being in the words and figures already stated above, on pages 118 [158] to 120 [159]. Counsel for the Government objected to the admission of this letter in evidence. As before, no objection was made on the ground that the paper offered was a copy, nor on the ground that the mailing of the letter had not been proved. Counsel for the defence contended that, in addition to the grounds stated when a copy of this letter was previously offered in evidence, there was now an additional ground for its admission, inasmuch as it now appeared that this letter was exhibited to Mr. Dickinson during a conversation with Mr. Clark, and that the contents of it formed a part of the conversation.

The presiding judge sustained the objection of the attorney for the Government, and refused to admit the evidence in question. The defendant Dickinson, by his counsel, duly and seasonably excepted to this ruling and his exception was duly noted.

EVIDENCE AS TO FINANCIAL STANDING OF MAKERS OF NOTES.

In opening the case to the jury, Mr. Jones, counsel for the Government, stated, among other things, that the Government proposed to prove that the overdrafts resulting from the transactions complained of were covered up by the discount of worthless notes. In the course of his opening, Mr. Jones stated briefly that the Government proposed to prove under each count separately, and in so doing, after describing the transaction complained of as a
161 misapplication, Mr. Jones, in the case of each count, proceeded to state that this transaction was covered up by the discount of certain notes, naming the makers and amounts of such notes. The Government contended that the notes so discounted were worthless and were known to both defendants to be worthless. Both defendants denied this and testified that they believed the notes to be good.

The contention that these notes were used to cover up the transactions complained of was carried throughout the trial and maintained in the closing argument on behalf of the Government.

In that portion of the bookkeeper Taylor's testimony in which each of the counts in the indictment was taken up separately, and the payment of the check charged as a misapplication in the count in question was proved, together with the condition of Mr. Dickinson's account on the day of payment, the Government proceeded, under each count separately, immediately after the testimony just described, to question the witness as to the date when the check in question was entered in the ledger and as to what note or notes were discounted and credited to Mr. Dickinson's account on that date.

In the closing argument on behalf of the Government, Mr. Jones briefly rehearsed the testimony under certain counts, and in each case

referred—in connection with the payment of the check and the manner in which it was dealt with—to the notes which were credited to Mr. Dickinson's account on the day when the check was entered in the ledger.

In the charge of the court to the jury two of the counts were selected as samples, and the evidence under those counts was briefly referred to. These two counts were the first and fifteenth, and in each case the presiding judge, in referring to the evidence, mentioned the discounting of the notes which had been connected with the count in question in the Government's evidence as above stated.

Counsel for the Government, however, expressly and repeatedly stated in the course of the trial that the defendants were not on trial for discounting notes, and that the evidence in regard to discount of notes was introduced simply for its bearing upon the intent
162 and the good faith of the defendants, and the court so instructed the jury.

As has already appeared, the Government also introduced evidence as to the amounts held by the bank on different dates of the paper of those makers whose notes, according to the contention of the Government, were used as covers for the transactions complained of. These makers were John W. Dickinson, John W. Dickinson, trustee, W. P. Dickinson & Company, the Penacook Manufacturing Company, Plumbers' Wodworking Company, Alabama Kaolin Company, Fitch, Garrett, Sias and Thorpe.

The Government also introduced evidence, as has already appeared, in regard to the amounts held by the bank at different times of the paper of L. H. Schneider and Foster & Sias. The Government's evidence as to notes of all these makers included the manner in which such notes came into the bank, the dates of discount and renewal, etc., as already stated.

The Government contended that none of the makers above named were financially responsible for the amounts of their notes held by the bank during the period covered by the counts of the indictment, and that the defendants Dickinson and Foster had knowledge or information to that effect; and evidence was introduced by the Government for the purpose of supporting this contention. All this evidence, except such as related directly to the financial responsibility of Mr. Dickinson, was admitted against the objection of counsel for the defendant Dickinson.

The evidence along this line, together with the exceptions of the defendant, is stated below.

All this evidence was originally admitted as against both defendants, except so far as this statement might be qualified by the general instructions referred to on page 3 [56] of this bill of exceptions, to the effect that evidence introduced in the case which had to do directly with only one of the defendants was not to be considered as against the other except so far as connection might be shown.

In the case of several of the makers in question, however, the jury was instructed by the presiding judge in his charge that certain of

the evidence introduced bearing on the financial standing of
163 such makers had not been connected with Mr. Foster and was
not to be considered as against him. The evidence as to which
this instruction was given will be designated below.

PENACOOK MANUFACTURING COMPANY.

The evidence introduced by the Government as to the financial responsibility of the Penacook Manufacturing Company was as follows:

On March 12, 1897, Mr. Dickinson purchased of the assignee in bankruptcy of H. H. Amsden & Sons, of Concord, N. H., a manufacturing plant with land, buildings, machinery, etc., located in Penacook, N. H. The plant was adapted to the manufacturing of plumbers' woodwork, and had been operated for that purpose. In this purchase Mr. Dickinson was associated with Michael J. O'Brien and Isaac K. Champion. The money was furnished chiefly by Mr. Dickinson. Mr. Champion and Mr. O'Brien put the transaction through. The price paid was $15,000 in certified checks. The deed of the property to Mr. Dickinson, dated March 12, 1897, was put in evidence.

On the same date a corporation was organized under the laws of New Hampshire, the name of such corporation being "Penacook Manufacturing Company." The Articles of Association were introduced in evidence, and stated the capital stock to be $100,000 and the corporators to be John W. Dickinson, Michael J. O'Brien, Isaac K. Champion.

On the same day it was voted by the stockholders that the corporation acquire from Mr. Dickinson the Amsden plant in Penacook. The plant was, in fact, conveyed to the company by Mr. Dickinson, in consideration of substantially all the capital stock, and $16,500 in notes of the company. The deed by which this conveyance was affected was put in evidence.

The Government called Mr. O'Brien as a witness, and the statements in the following paragraph are taken from his testimony.

The notes received by Mr. Dickinson from the company were indorsed by Mr. Dickinson and Mr. O'Brien, and discounted at the Shawmut National Bank in Boston. Mr. Dickinson told Mr. O'Brien
that $15,000 of the amount was to reimburse Mr. Dickinson,
164 and any others who had contributed, for the amount paid the
assignee of the Amsdens, and the balance was to be put into the company. Mr. Champion was made treasurer of the company and assumed the management. Some time before October, 1897, Mr. Dickinson told Mr. O'Brien that he was dissatisfied with Champion's management, that there had been more or less friction. Mr. O'Brien asked Mr. Dickinson what the prospect was for the payment of the notes discounted, as above stated, at the Shawmut bank, and Mr. Dickinson replied that he saw very little prospect of it at that time.

He added that he had put all his property out of his hands, and that if Mr. O'Brien did not wish to pay the notes himself he had better do the same. These notes were in fact paid shortly after when Mr. Pitt J. Baker came into the company.

Mr. Baker was called as a witness for the Government and testified as follows:

In October, 1897, Mr. Baker had a conversation with Mr. Dickinson in which Mr. Baker said he was prepared to take up an option then held by Mr. Champion to purchase such of the stock of the Penacook Company as Mr. Champion did not already hold. Mr. Dickinson agreed to transfer this stock to Mr. Baker if Mr. Baker would assume the liabilities of the company, which Mr. Dickinson then stated as amounting to $28,000. It was understood that the stock which Mr. Dickinson agreed to transfer was owned partly by himself and partly by a Mr. Parker, Mr. McDowell, Mr. O'Brien and Mr. Blackwood; and that the liabilities in question included the reimbursement of Mr. Dickinson and these persons for money which they had put into the company. At a later conversation with Mr. Baker, Mr. Dickinson stated that he had found the liabilities to be larger than he first supposed, amounting altogether to some $42,000. It was finally agreed that Mr. Baker should assume $38,000 of this liability, and Mr. Dickinson should take care of the rest.

In November, 1897, this transaction was carried through. Mr. Dickinson transferred $85,000 of the stock to Mr. Baker, and Mr. Dickinson and Mr. McDowell joined in a bond to Mr. Baker, in which they agreed to take care of the liabilities in excess of $38,000. Mr. Baker and Mr. Champion gave a bond to Mr. Dickinson in which they agreed to take care of the liabilities of the company up
165 to $38,000. This bond was not given until January, 1898. Both bonds were introduced in evidence. After Mr. Baker and Mr. Dickinson had agreed on the terms of the above transaction, Mr. Baker assumed the management of the Penacook Company and became the president.

Herbert M. DeLanoie was called as a witness for the Government and testified that in 1898 and 1899 he was loan clerk of the Knickerbocker Trust Company. The matters stated below in connection with a mortgage to the Knickerbockor Trust Company appeared from his testimony and the testimony of Mr. Baker and certain papers which were introduced in evidence, as will appear.

On November 1, 1897, Mr. Baker negotiated a mortgage of the entire plant of the Penacook Manufacturing Company to the Knickerbocker Trust Company, as security for an issue of bonds of the par value of $51,000. Bonds of the par value of $50,000 were in fact issued. Mr. Dickinson had nothing to do with this negotiation. The Knickerbocker Trust Company received all the bonds, but advanced only $25,000 on account of the bonds and mortgage. This loan was subsequently renewed for the same amount. Seven hundred and fifty dollars interest was paid on the original loan.

Mr. Baker testified that in August, 1898, he invited Mr. Dickinson to come back into the Penacook Company, and Mr. Dickinson agreed to do so. The arrangement was that he should be elected treasurer and run the financial end of the company. Mr. Baker told him, in the course of the negotiations, that the liabilities were substantially the same as when Mr. Dickinson transferred his stock to Mr. Baker. He told Mr. Dickinson of the $25,000 loan held by the Knickerbocker Company, and said that if a small part was paid the balance could easily be carried indefinitely. It was agreed that the $85,000 of stock held by Mr. Baker should be transferred to Mr. Dickinson in trust, $51,000 to be voted by Mr. Baker and Mr. Dickinson jointly, and the rest to be used for the benefit of the company, or given as a bonus in connection with the sale of bonds. Mr. Dickinson received the stock and gave a receipt, which was put in evidence. This receipt stated that the stock was received "For cancellation, and to be issued as mutually agreed." Just before or just after the transfer Mr. Dickinson and Mr. Baker made an
166 inspection of the company's plant. In the negotiations in connection with this transfer, Mr. Dickinson asked that Mr. Foster be made a director, and Mr. Baker agreed.

A directors' meeting was held in August, 1898, at which neither Mr. Dickinson nor Mr. Foster was present, and Mr. Dickinson and Mr. Foster were elected directors in place of Mr. Baker and I. K. Champion, both resigned. Mr. Dickinson was then elected treasurer. After that Mr. Dickinson managed the finances of the company, and Mr. Baker took charge of the sale of the product, his regular business being the sale of plumbers' supplies.

On October 5, 1898, the Knickerbocker Trust Company received from Mr. Dickinson a payment of $1,500 on account of the Penacook mortgage, and four bonds of a par value of $1,000 each were returned to Mr. Dickinson. This was the only payment ever made on account of the principal of the loan. After the renewal, some $60 or $80 interest was paid. There were no other payments except those which have been stated.

On January 26, 1899, a stockholders' meeting was held, at which Mr. Dickinson, Mr. Foster, Mr. Baker, Mr. O'Brien and A. H. Brigham were elected directors.

Mr. O'Brien testified to a number of occurrences and conversations between August, 1898, and March, 1899, as follows:

Shortly before Mr. Dickinson's return to the company, the H. C. Folger Company had given a thirty days' note for $90 to the Penacook Company, and this note had been transferred, with the indorsements of the Penacook Company and of Mr. O'Brien. When the note fell due it was not paid by the maker, and was protested. This note was introduced in evidence. Mr. O'Brien spoke to Mr. Dickinson a great many times about this $90 note, asking Mr. Dickinson to pay it, as treasurer of the Penacook Company. Mr. Dickinson always declined to do so on the ground that the company had no

money available, saying that as soon as the company had money he would pay it. Mr. O'Brien finally paid the note. Between August, 1898, and March, 1899, Mr. O'Brien spoke to Mr. Foster about this $90 note, saying that it was not fair that he should be compelled to pay it, and Mr. Foster agreed with him.

Mr. O'Brien thought there were three meetings of the
167 directors between August, 1898, and March, 1899, at which Mr. Foster was present. At one of these meetings Mr. O'Brien testified that the failure of the company to pay its help was mentioned, Mr. O'Brien saying that he thought the help ought to be paid first of all. Mr. Dickinson said that the company was too short of money. Except, as already stated, Mr. O'Brien did not remember that at any directors' meeting at which Mr. Foster and Mr. Dickinson were present, before March, 1900, anything was said about the inability of the company to pay its notes, but something was said about the inability of the company to pay its accounts. Mr. Foster took very little part in the meetings.

Mr. O'Brien also testified to a conversation in Mr. Dickinson's office in Boston, at which Mr. Dickinson, Mr. Foster, Mr. O'Brien, a Mr. Lund, and a Mr. Dudley were present. Mr. Dudley was cashier of the Mechanics' National Bank of Concord, N. H., and Mr. Lund was a lawyer, who appeared at the above interview as counsel for the Mechanics' National Bank. Mr. Lund was called as a witness for the Government, and the following statement of the interview in question is taken from the testimony of Mr. Lund and Mr. O'Brien:

Before Mr. Dickinson came back into the company, and during Mr. Baker's management, the Penacook Company had made its note for $900, and this note was held by the Mechanics' National Bank. After Mr. Dickinson's return to the management of the company, the note was renewed and the renewal was indorsed by Mr. Dickinson and Mr. O'Brien.

The interview above referred to took place in the spring of 1899. Mr. Lund and Mr. Dudley called upon Mr. Dickinson at his office, Mr. O'Brien being present; and Mr. Lund, as counsel for the Mechanics' National Bank, made demand on Mr. Dickinson and Mr. O'Brien in their character as indorsers for the payment of the note.

Mr. O'Brien and Mr. Lund differed somewhat as to the order of arrival of the various persons present in Mr. Dickinson's office at the time of this interview. Mr. O'Brien testified that he arrived at the office before Mr. Lund and Mr. Dudley; that he found Mr. Foster there, seated in the outer office; that Mr. Dickinson came out of the inner office and told Mr. O'Brien that Mr. Lund and Mr.
Dudley were coming to ask for payment of the $900 note; that
168 Mr. Dickinson, Mr. O'Brien, and Mr. Foster then went into the inner office, and Mr. Lund and Mr. Dudley arrived some time later; that all five persons were present throughout the rest of the interview. Mr. Lund testified that he and Mr. Dudley arrived before Mr. O'Brien; that he thought Mr. O'Brien was sent for after they

arrived. He was not certain whether Mr. Foster was present at the very beginning of the interview, but stated that Mr. Foster was there when those things were said which are stated below as having been said by Mr. Lund, or while he and Mr. Dudley were in the office. Mr. Lund also testified that to the best of his recollection Mr. Foster went away before the interview was entirely closed. Neither Mr. O'Brien nor Mr. Lund was entirely certain as to those matters connected with the relative time of arrival.

The testimony of both as to what was said at that portion of the interview at which both were present was substantially similar, and was as follows:

Mr. Lund asked for a settlement of the note, and Mr. Dickinson, speaking for himself and Mr. O'Brien, declined to pay the full amount in cash. He offered, however, to pay $500 in cash and renew the rest, saying that he would assume half of the amount if Mr. O'Brien would assume the other half, and to this offer Mr. O'Brien agreed. Mr. Lund insisted upon payment of the entire amount in cash immediately and this Mr. Dickinson and Mr. O'Brien refused.

Mr. Dickinson stated that he had not received any consideration for indorsing the note, and did not feel like paying the whole amount in cash. He also stated that he had been induced to indorse this renewal of the original note by Mr. Dudley's agreement to extend further credit to the Penacook Company, in return for Mr. Dickinson's indorsement on this note, and that Mr. Dudley had since broken this agreement. Mr. Lund and Mr. Dudley continuing to insist that they must have the whole amount in cash, Mr. Dickinson told them to go and collect it if they could, and Mr. Lund substantially notified Mr. Dickinson and Mr. O'Brien that suit would be brought on the note.

Mr. Dickinson did almost all the talking on his side, Mr. O'Brien speaking very little. Mr. Foster took no part in the conversation.

Mr. O'Brien did not remember that the note was spoken of
169 during the interview as a note of the Penacook Manufacturing Company, and testified that so far as he remembered there was no discussion of the assets of the company, and nothing said about its liability to pay. Mr. Lund was inclined to think that he spoke of the note as a note of the Penacook Company.

The Government introduced in evidence the record of a suit filed by the Mechanics' National Bank against the Penacook Manufacturing Company, John W. Dickinson and Michael J. O'Brien, to enforce the payment of the above note. The writ was dated April 12, 1900.

It appeared that a meeting of the stockholders of the Penacook Company was held in March, 1899, at which Mr. Dickinson and Mr. Foster were present. Mr. O'Brien testified that at this meeting Mr. Dickinson produced a draft of a lease by the Penacook Company of its entire plant to the Plumbers' Woodworking Company, and advised the stockholders to vote in favor of executing such a lease,

saying that if they did not the Knickerbocker Trust Company would take all Penacook Company had. Mr. O'Brien testified that this lease was handed to him; that he read it through and then handed it to Mr. Foster, and that Mr. Foster read it. Mr. O'Brien did not remember of anything further that was said at this meeting as to the reasons for making this lease. Two other witnesses introduced by the Government who were present at this meeting testified similarly. One of these witnesses testified that Mr. Foster voted on the question of making the lease.

A record of this meeting in the Stockholders' Record Book was introduced in evidence and was as follows:

CONCORD, N. H., *March 30, 1899.*

A special meeting of the members (stockholders) of the Penacook Manufacturing Company was held at the office of Streeter, Walker & Hollis, to-day, at eleven o'clock in the forenoon, in accordance with the foregoing notice.

The meeting was called to order by the President and the following notice was read by the clerk.

On motion of George M. Foster, duly seconded by Mr. Dickinson, it was voted to proceed to elect directors for the ensuing year.

On motion of Mr. Dickinson, duly seconded by Mr. O'Brien, it was voted that George M. Foster be chosen teller to receive, sort,
170 and counts the ballots. The result of the vote was reported by the teller as follows:

Whole number of votes cast	1,371	shares.
Necessary for choice	686	
George M. Foster received	1,371	
John W. Dickinson received	1,371	
M. W. O'Brien received	1,371	
A. W. Brigham received	1,071	
John A. Blackwood received	1,071	
P. J. Baker received	300	
A. D. Chattaway received	300	

The president, through his counsel, E. G. Leach, esq., stated that he declined to receive the vote of John W. Dickinson on certificate No. 20 for 1,020 shares of stock, issued to and standing on the books of the company in the name of P. J. Baker and Isaac K. Champion, trustees, and assigned on the back of said certificate by said Baker and Champion, trustees, to John W. Dickinson, because said shares have been turned in to the company for cancellation and are in Mr. Dickinson's possession as treasurer of said company and not as owner, as shown by receipt, of which the following is a copy:

CONCORD, N. H., *Aug. 9/98.*

Received from P. J. Baker (cttks.) 1,700 shares Penacook Mfg. Co. stock, par value $50.00 (fifty dollars) per share. These certificates for cancellation and to be issued as mutually agreed.

JOHN W. DICKINSON,
Treas.

Mr. Dickinson, through his counsel, H. F. Hollis, esq., stated that he insisted that he had a legally valid certificate No. 20 for 1,020 shares, and that said vote had elected the five persons for whom it was cast as directors of the Penacook Manufacturing Company; that said certificate properly assigned is the only evidence of ownership which can be received at this meeting; and that the receipt mentioned by P. J. Baker is invalid and of no effect.

In answer to Mr. Dickinson's claim as stated, the president, through his counsel, Mr. Leach, called upon Mr. Dickinson as treasurer of the company to produce any evidence showing any payment for the stock or any record of the company showing any authority in him to vote upon it.

Mr. Dickinson, through his counsel, Mr. Hollis, stated that he stood upon his former statement and declined to try his title to said certificate before Mr. Baker, who is an interested party.

The president then declared the vote as follows:

	Whole number of votes cast	351
	Necessary for choice	176
	George M. Foster received	351
171	John W. Dickinson received	351
	M. W. O'Brien received	351
	A. D. Chattaway received	300
	F. J. Baker received	300
	A. G. Brigham received	51
	John A. Blackwood received	51

And the president declared George M. Foster, John W. Dickinson, M. W. O'Brien, A. D. Chattaway and P. J. Baker elected directors for the ensuing year.

To this declaration of the president, Mr. Dickinson, through his counsel, Mr. Hollis, objected, and requested the president to declare the following persons elected as directors for the ensuing year: Messrs. George M. Foster, John W. Dickinson, M. W. O'Brien, A. G. Brigham and John A. Blackwood, they having received a majority of all the votes cast, as evidenced by the stock certificates.

Mr. Dickinson offered the following resolution and moved its adoption, the motion being seconded by Mr. Foster:

Resolved, That the stockholders of the Penacook Manufacturing Company hereby ratify and confirm the action of its directors on March 31st, 1899, in voting to lease to the Plumbers' Woodworking Company of Concord, New Hampshire, its manufacturing plant, tools, machinery, franchises, easements and business, subject to the mortgage to the Knickerbocker Trust Company, and sell to said Plumbers' Woodworking Company its storehouse near the railroad station at Penacook, and its stock on hand, and stock for manufacture and in process of manufacture, all in accordance with the lease and contract executed March 31, 1899, by the treasurer of said Plumbers' Woodworking Company, and the treasurer of said Penacook Manufacturing Company, and authorizing said treasurer of said Penacook Manufacturing Company to execute said lease and contract on behalf of said Penacook Manufacturing Company.

Upon this motion a stock vote was taken and Mr. Foster was appointed teller, and reported the state of the vote as follows:

Total number of shares voting	1,371
Number voting yes	1,171
Number voting no	200

The President, through his counsel, Mr. Leach, objected to Mr. Dickinson voting certificate No. 20 for 1,020 shares, upon the grounds hereinbefore set forth. Mr. Dickinson objected to Mr. Baker voting any stock. The president declined to recognize Mr. Dickinson's right to vote on said certificate No. 20 and declared the vote as follows:

Whole number of votes cast	351
Number of shares voting yes	151
Number of shares voting no	200

and declared the motion lost.

172 Mr. Dickinson, through his counsel, Mr. Hollis, objected to the announcement by the president, and insisted that his vote on 1,020 shares be counted in favor of said motion, and that the 200 shares voted by Mr. Baker be not counted, he not being the legal owner thereof.

On motion of Mr. Dickinson, it was voted to adjourn.

A true record:

Attest: ALLEN HOLLIS, *Clerk.*

It appeared that such a lease was in fact executed and that the Plumbers' Woodworking Company took charge of the plant in March, 1899. The terms of the lease will be stated below under the evidence concerning the Plumbers' Woodworking Company.

It appeared that Mr. Dickinson sent a copy of this lease to the Knickerbocker Trust Company in a letter dated April 20, 1899. This letter was put in evidence, and was as follows:

[John W. Dickinson, bonds and mortgages, 53 State street.]

BOSTON, *April 20th, 1899.*

KNICKERBOCKER TRUST CO.,
 # 68 Broadway, New York, N. Y.

GENTLEMEN: By the time this letter reaches you, you will doubtless have received, through Mr. P. J. Baker, a full account of the changes which have taken place at Penacook. I intended to give you this information some time ago, and I requested Mr. Baker to come to Boston the latter part of March, so that we might consult about the proposed changes. On account of pressing business, however, Mr. Baker failed to come east until last week, although it was fully expected by him and by me that he would attend the directors' meeting of the Penacook Manufacturing Co. at Concord on March 31st.

Believing that the lease of the corporation plant to be the best thing for all parties concerned, we voted to carry it out. I have not

written you directly about the matter before, because I thought that I ought to inform Mr. Baker first, and allow him to explain the change to you, because he is the one that did the business with you at the time the mortgage loan was made. Mr. Baker has a copy of the lease to show you, but thinking that you might like a copy to retain, and as I have an extra copy on hand, I will enclose it herewith.

The directors of the Penacook Manufacturing Company, finding the finances of the corporation in bad shape, and being unable to raise enough ready money to carry on the business further, decided
173 that a lease was necessary in order to save the corporation from insolvency. The Lessee corporation, the Plumbers Woodworking Company of Concord, N. H., is well equipped to do business, and after the business is placed on a firm footing, the Penacook Manufacturing Company may terminate the lease and go into possession on three months' notice. Until that time, the interests of the Knickerbocker Trust Company are better protected than they could possibly have been by the Penacook Manufacturing Company. You will see on page seven of the lease how the net income of the business is to be applied, and what provision is made for meeting the interest on the mortgage debt. This part of the lease was very carefully considered, and I believe that it will enable the Penacook Manufacturing Company to catch up on its coupons within two or three years.

You will also see that the lease is made subject to your mortgage, and does not impair your security in any way. I hope that your company will give the lease your careful consideration, and will assent thereto. I am firmly convinced that your security is good as long as the plant is kept running, but I fear if it is once allowed to stop it cannot be sold for more than $10,000. If there is any phase of the matter which you do not understand, I should be glad to talk the matter over with any one representing your Company, at any time.

Very truly yours, JOHN W. DICKINSON.

Enclosure.

The Government introduced in evidence so much of the record of a bill in equity as showed that suit was brought April 27, 1899, by the Knickerbocker Trust Company against the Penacook Manufacturing Company in the United States Circuit Court for the District of New Hampshire, to foreclose a mortgage on the plant of the Penacook Company.

It appeared on cross examination of Mr. O'Brien that after the lease to the Plumbers' Woodworking Company Mr. O'Brien was treasurer of the Penacook Company. He testified that as such treasurer, after the above suit was brought by the Knickerbocker Trust Company, he notified his customers of the Plumbers' Woodworking Company not to pay their accounts to that company, on

the ground that such accounts were properly payable to the Penacook Manufacturing Company.

Mr. O'Brien also testified on cross examination that at the stockholders' meeting in March, 1900, at which, as appears by the above record, a difference arose between Mr. Baker and Mr. Dickinson, Mr. O'Brien voted with Mr. Baker.

174 The Government put in evidence a letter from Mr. Dickinson to Mr. Baker, dated March 6, 1900. This letter was as follows:

[John W. Dickinson, bonds and mortgages, 53 State street. New York, 7 Pine street.]

BOSTON, *March 6, 1900.*

Mr. P. J. BAKER,
New York, N. Y.

DEAR SIR: Your favor of the 5th received and contents noted. If you hold my receipt for $85,000 par value of the stock of the Panacook Mfg. Co. you must have written it yourself. The understanding was regarding this stock that it should be turned over to me, the consideration being that I was to advance certain monies to the Penacook Co. which I did, paying for merchandise, pay rolls, etc., and the stock is mine. Regarding sales of the stock, you know as well as I do that it is valueless, it never cost a dollar in the first place, and is worth just what it cost. I will admit that I thought the stock might have some value later, when I agreed to go in again and advance the Co. money and my opinion was based upon what you told me regarding the liabilities of the Co. but after I had advanced several sums of money, I found that the liabilities were two or three times greater than you had stated. For instance, regarding the pay roll, you told me they were four weeks behind; I found, upon investigation, that there was about twelve weeks' pay due the men.

Regarding requests that you have made on me, I do not know of any former requests that you have made, asking me, as treasurer, to account for monies that I had received for stock. I consider such a request only fit to eminate from the brain of a romancer, not a business man, especially one who knows all about the Co. Regarding any reasonable request that you may ask of me, I shall always take pleasure in answering the same, but as I said to you in N. Y., I would like to have you come out and state your position whether you have a desire to protect the interests of the Penacook Co. or if on the other hand, you are using your position as an officer of that Co. to aid outside parties to pull it down. I also ask you again to send me for Mrs. Dickinson an accounting of the goods belonging to her that were consigned to you, with the distinct understanding that none of them were to be sold unless the sale was approved by me and

that the goods were her property until paid for. You said in the presence of my attorney, that you would give me that accounting and that there were sums of money due you from sales. It does seem as though I cannot have any transactions with you of any kind that are not mixed up in all sorts of ways. Why don't you come out in the open and do your business man fashion; you will never make a success nor no other man that does business in that sort of a way. Regarding your meetings in N. Y., I have no money in my hands, as treasurer for the Penacook Mfg. Co. to waste on car fares to attend meetings in N. Y. or any other place, and I would advise you, if you want to hold a meeting to hold it in Concord, where the Co.'s property is. My attorney writes me this morning that you are waiting to hear from me before you give him the statement you promised; now that you have heard from me, I hope you will send it. As I said to you before, I am a man of peace, and am not looking for war, but if it comes, I do my best to defeat the enemy.

Very truly yours,

JOHN W. DICKINSON.

The annual returns of the Penacook Manufacturing Company, on May 1, 1899, and May 1, 1900, were put in evidence by the Government. They were as follows:

ANNUAL RETURNS.

Of the Penacook Mfg. C ., a corporation duly established under the laws of the State of Nev Hampshire, as existing on the first day of May, 1899, made in conformity to the Public Statutes of New Hampshire, sect. 16, chap. 150.

Principal place of business of the Corporation, Penacook, N. H.

Post-office address of treasurer, 53 State st., Boston, Mass.

Date of incorporation, Mar. 11, 1897.

Amount of capital stock authorized, $100,000.

Number of shares issued, 2,000.

Par value of shares, $50.

Amount of capital stock paid in, $100,000.

Amount of debts due the corporation, $6,098.54.

Amount of debts due from the corporation, $59,039.17.

Amount of property of the corporation, $128,850.00.

Kind of property of the corporation, plant lease, franchises, goods manufactured and in process.

ARTHUR G. BRIGHAM,
JOHN W. DICKINSON,
M. W. O'BRIEN,
Directors.

JOHN W. DICKINSON, *Treasurer.*

THE STATE OF MASS.

MAY 31, 1899.

SUFFOLK, *ss:*

Then personally appeared John W. Dickinson, treasurer, and Arthur G. Brigham, M. W. O'Brien, John W. Dickinson, a
176 majority of the directors of said corporation, and made oath that the above statement by them signed is true.

Before me:

GEORGE W. FOSTER,
Justice of the Peace.

STATE OF NEW HAMPSHIRE.
OFFICE OF SECRETARY OF STATE,
Concord, June 25, 1901.

I certify that the foregoing is a true copy of an annual return of the Penacook Manufacturing Company as existing May 1, 1899.

Filed in this office.

In testimony whereof I hereunto subscribe my official signature and affix the seal of the State.

[SEAL.]

SAMUEL H. STEARNS,
Depty. Secy. State.

ANNUAL RETURN.

Of the Penacook Mfg. Co., a corporation duly established under the laws of the State of New Hampshire, as existing on the first day of May, 1900, made in conformity to the Public Statutes of New Hampshire, sect. 16, chap. 150.

Principal place of business of the corporation, Penacook, N. H.
Post-office address of treasurer, 53 State st., Boston, Mass.
Date of incorporation, March 11, 1897.
Amount of capital stock authorized, $100,000.
Number of shares issued, 2,000.
Par value of shares, $50.
Amount of capital stock paid in, $100,000.
Amount of debts due the corporation, $6,098.54.
Amount of debts due from the corporation, $59,039.17.
Amount of property of the corporation, $128,850.00.
Kind of property of the corporation, plant, leases and franchise.

JOHN W. DICKINSON,
GEORGE M. FOSTER,
Directors.

JOHN W. DICKINSON, *Treasurer.*

THE STATE OF MASS.

MAY 31, 1900.

SUFFOLK, *ss:*

Then personally appeared John W. Dickinson, Treasurer, and George M. Foster, Director, and acknowledged this to be their free

act and deed, a majority of the Directors of said Corporation, and made oath that the above statement by them signed is true.

GEORGE M. SIAS,
Justice of the Peace.

177 STATE OF NEW HAMPSHIRE,
OFFICE OF SECRETARY OF STATE,
Concord, June 25, 1901.

I certify that the foregoing is a true copy of the annual return of the Penacook Manufacturing Company as existing May 1, 1900, filed in this office.

In testimony whereof I hereunto subscribe my official signature and affix the seal of the State.

[SEAL.] SAMUEL N. STEARNS,
Depty. Secy. State.

The Government introduced in evidence a letter from Mr. Dickinson to the Knickerbocker Trust Company, dated December 30, 1899. This letter was as follows:

[John W. Dickinson, bonds and mortgages, 53 State street. New York, 7 Pine street.]

BOSTON, *Dec. 30, 1899.*

KNICKERBOCKER TRUST COMPANY,
Broadway, New York, N. Y.

GENTLEMEN: I have recently carefully examined the plant of the Penacook Company and I find it very badly out of repair. In my judgment, it will require at least $10,000 to place it in condition for any tenant that would expect to carry on a successful business. If the plant can be bought for what it is actually worth, I am willing to bid for it, and would be pleased to have you name the lowest price you will accept.

Very truly, yours, JOHN W. DICKINSON.

The presiding judge, in his charge to the jury, instructed them that the following portions of the evidence above stated in connection with the Penacook Manufacturing Company had not been connected with Mr. Foster, and that the jury were not to consider such portions of the evidence as against Mr. Foster—the articles of association of the Penacook Manufacturing Company (except as to the fact that the Penacook Company was a corporation); the annual return of the Penacook Manufacturing Company of May 1, 1899; the deed from the assignee of H. H. Amsden & Sons, conveying to Mr. Dickinson the plant afterward operated by the Penacook Company; the bond given by Mr. Dickinson and Mr. McDowell, in
178 connection with the assumption by Mr. Baker of the control of the Penacook Company; the bond given by Mr. Baker and Mr. Champion to Mr. Dickinson in January, 1899; the letters of Mr. Dickinson to the Knickerbocker Trust Company, dated April 20, 1899,

and December 30, 1899; the letters from Mr. Dickinson to Mr. Baker, dated November 5, 1898, and March 6, 1900; and the evidence regarding the suit of the Mechanics' National Bank against Mr. Dickinson (except so far as to show the claim against Mr. Dickinson at the time the suit was brought).

PLUMBERS' WOODWORKING COMPANY.

The Government introduced evidence tending to show the following facts in connection with the Plumbers' Woodworking Company:

That company was organized in March, 1899, for the purpose of taking a lease of the plant of the Penacook Company and operating that plant. Mr. Dickinson and Mr. Foster were among the incorporators, and Mr. Foster became treasurer of the company. The capital stock was $5,000.

As already stated, the company did take a lease of the Penacook plant, and continued to operate that plant through 1899 and 1900. By the terms of the lease a certain proportion of the profits of the business was first to be applied to paying the interest on the mortgage of the Penacook Company to the Knickerbocker Trust Company. The remaining profits were to be divided at a fixed ratio between the Penacook Company and the Plumbers' Woodworking Company. There was a provision by which the Penacook Company could resume possession at any time on three months' notice.

The Government put in evidence the annual returns of the Plumbers' Woodworking Company on May 1, 1899, and May 1, 1900. These returns were as follows:

ANNUAL RETURN.

Of the Plumbers' Woodworking Company, a corporation duly established under the laws of the State of New Hampshire, as existing on the first day of May, 1899, made in conformity to the Public Statutes of New Hampshire, sect. 16, chap. 150.

Principal place of business of the corporation, Concord, N. H.

Post-office address of treasurer, Peabody, Mass.

179 Date of incorporation, March 31, 1899.

Amount of capital stock authorized, $5,000.

Number of shares issued, 100.

Par value of shares, $50.

Amount of capital stock paid in, $5,000.

Amount of debts due the corporation, $2,427.72.

Amount of debts due from the corporation, $7,507.48.

Amount of property of the corporation, $10,074.76.

Kind of property of the corporation, material for manufacture, stock manufactured and in process of manufacture.

JOHN W. DICKINSON,
BENJ. L. BLACKWOOD,
Directors.

GEORGE M. FOSTER, *Treasurer.*

THE STATE OF MASSACHUSETTS.

JUNE 5th, 1899.

SUFFOLK, *ss:*

Then personally appeared George M. Foster, treasurer, and John W. Dickinson, a majority of the directors of said corporation, and made oath that the above statement by them signed is true.

Before me:

GEORGE W. FOSTER,
Justice of the Peace.

STATE OF NEW HAMPSHIRE.

JUNE 8th, 1899.

MERRIMACK, *ss:*

Then personally appeared Benjamin L. Blackwood, a director of said corporation, making with said John W. Dickinson a majority of said directors, and made oath that the above statement by him signed is true.

Before me:

HENRY F. HOLLIS,
Justice of the Peace.

STATE OF NEW HAMPSHIRE,
OFFICE OF SECRETARY OF STATE,
Concord, June 25, 1901.

I certify that the foregoing is a true copy of an annual return of the Plumbers' Woodworking Company as existing May 1, 1899. Filed in this office.

In testimony whereof I hereunto subscribe my official signature and affix the seal of the State.

[SEAL.]

SAMUEL H. STEARNS,
Depty. Secy. State.

180 ANNUAL RETURN

Of the Plumbers' Woodworking Company, a corporation duly established under the laws of the State of New Hampshire, as existing on the first day of May, 1900, made in conformity to the Public Statutes of New Hampshire, sect. 16, chap. 150.

Principal place of business of the corporation, Concord, N. H.
Post-office address of treasurer, Peabody, Mass.
Date of incorporation, March 31, 1899.
Amount of capital stock authorized, $5,000.
Number of shares issued, 100.
Par value of shares, 50.
Amount of capital stock paid in, $5,000.
Amount of debts due the corporation, $10,919.47.
Amount of debts due from the corporation, $20,556.
Amount of property of the corporation, $18,625.54.

Kind of property of the corporation, material for manufacture, stock manufactured and in process of manufacture.

JOHN W. DICKINSON,
BENJ. L. BLACKWOOD,
Directors.

GEORGE M. FOSTER, *Treasurer.*

THE STATE OF MASS.

JUNE 1st, 1900.

SUFFOLK, *ss:*

Then personally appeared John W. Dickinson, treasurer, and acknowledged this to be his true act and deed, _____ a majority of the directors of said corporation, and made oath that the above statement by them signed is true.

Before me:

GEORGE W. SIAS,
Justice of the Peace.

STATE OF NEW HAMPSHIRE.

JUNE 2, 1900.

MERRIMACK, *ss:*

Then personally appeared Benj. L. Blackwood, a director in said corporation, and made oath that the above statement by him signed is true.

Before me:

JOHN B. DODGE,
Justice of the Peace.

STATE OF NEW HAMPSHIRE,
OFFICE OF SECRETARY OF STATE,
Concord, June 25, 1901.

I certify that the foregoing is a true copy of the annual return of the Plumbers' Woodworking Co. as existing May 1, 1900. Filed in this office.

181 In testimony whereof I hereunto subscribe my official signature and affix the seal of the State.

[SEAL.]

SAMUEL H. STEARNS,
Depty. Secy. State.

The Government also put in evidence the articles of association of the Plumbers' Woodworking Company.

ALABAMA KAOLIN COMPANY.

The Government introduced in evidence the following described papers and documents, which were marked as exhibits in the case:

The deed from the North Alabama Land & Development Company to John W. Dickinson, dated September 6, 1897, conveying

various tracts of land in Alabama and carrying with it the right to mine clay in some 1,200 acres of land.

A certificate of incorporation of the Alabama Kaolin Company, dated September 9, 1897, stating that company was authorized to mine, sell, and handle kaolin and manufacture it into the artcles for which it may be used; to lease, own, bond, mortgage, and operate kaolin lands in Alabama. This certificate showed that the company was authorized to issue capital stock to the amount of $500,000. The names of the corporators did not include either Mr. Dickinson or Mr. Foster.

A deed from John W. Dickinson to the Alabama Kaolin Company, dated September 29, 1897, and conveying the property described in the above mentioned deed from the North Alabama Land and Development Company to John W. Dickinson.

A mortgage from the Alabama Kaolin Company to the International Trust Company, of Boston, of all the property of the former company, reciting that the said mortgage was to secure an issue of bonds to the amount of $100,000.

Three receipts signed by John W. Dickinson and running to the International Trust Company, dated October 15, October 18, and November 1, 1897, and acknowledging the receipt from the company of bonds of the Alabama Kaolin Company to the amount of $20,000, $10,000, and $70,000, respectively.

A deed dated April 27, 1898, from John W. Dickinson and his wife,
Gertrude H. Dickinson, to the Alabama Kaolin Company,
182 reciting a consideration of one dollar, and conveying certain lands and buildings in Fort Payne, Alabama, and another tract of land, also in Alabama.

A certificate of stock of the Alabama Kaolin Company, dated October 27, 1897, certifying that George M. Foster was the owner of 400 shares of stock in the said company, and signed "Henry B. McDowell, president, John W. Dickinson, treasurer." (It appeared that the par value of the shares was $10 each.)

A certificate of stock of the Alabama Kaolin Company, dated March 25, 1896, signed "John W. Dickinson, president, George M. Foster, treasurer."

A bond of the Alabama Kaolin Company, dated October 1, 1897, signed "John W. Dickinson, treasurer," and reciting that it was one of an issue of bonds amounting to $100,000 secured by a mortgage of all the property of the Alabama Kaolin Company to the International Trust Company.

When this bond was offered in evidence objection was made on behalf of both defendants, and the Government contended that the bond was admissible on two grounds; first, as showing that this particular bond was issued by the company; and second, as tending to show by its recital that the property of the company was mortgaged and that $100,000 worth of bonds were issued. There was no contention that this bond was ever seen by Mr. Foster. The Government called attention to the fact that it was signed by Mr. Dick-

inson. The presiding judge overruled the objections of counsel for the defendants and admitted the bond in evidence on the grounds above mentioned as having been stated by counsel for the Government.

The Government also introduced evidence as to the consideration paid by Mr. Dickinson for the Alabama properties, and the consideration which he received from the Alabama Kaolin Company for those properties.

The Government called as a witness Dwight P. Montague, of Chattanooga, Tennessee, who testified that he was a manufacturer of firebrick, sewer pipe, and brick. The deed from the Alabama Land and Improvement Company to John W. Dickinson, above referred to, was shown to the witness, who testified that he was acquainted with
183 the land in question. The Government then proceeded to examine Mr. Montague in regard to the character and value of this land, and on this subject his testimony was as follows:

Mr. Montague had once held leases of the land in question. He entered into possession of it in 1875 or 1876, and parted with it about 1882. During the period of his possession he used the land for firebrick purposes, and also shipped some clay to potteries in the north and east. He had had twenty-seven years experience in making bricks from fire-clay, and he manufactured firebricks from the clay on the property in question for five or six years, during which time he took our from 3,000 to 3,500 cars of clay. When he parted with the property he could not tell how much clay was left there, but the vein showed up very well at that time.

After Mr. Montague parted with it, the property went to the Franklin Pottery Company, of Franklin, Ohio, and that company worked it from three to five years. The Franklin Company ran a tunnel underneath the bank where Mr. Montague had mined, without striking any clay. At that time the level where Mr. Montague had worked had been stripped of the greater part of the clay which it contained.

In the above testimony Mr. Montague referred to clay suitable for firebrick or pottery purposes.

From the time the Franklin Company ceased working the property until Mr. Dickinson took charge of it there was no work done upon it. Since Mr. Dickinson purchased the land the witness had been on the property some six times. At these times he saw the work being done there.

A new track to the railroad had been put in and a building erected and equipped with machinery for preparing clay for potters. In 1898, 1899 and 1900, the witness had purchased forty-one cars of clay from the Alabama Kaolin Company at seventy-five cents a ton. The cars held an average of twenty tons each.

The witness testified that in 1899 and 1900 there was very little clay on the property suitable for making firebrick. He stated that

in his opinion the fair market value of the property in 1897 was from $1,500 to $2,000.

During the time he owned this property Mr. Montague sold
184 some clay from the land for china and pottery purposes. In the bed where he was working there was some very fine clay that potters were anxious to get. This clay was found in small deposits right in with the firebrick clay. There was a very limited amount of it upon the land. Mr. Montague thought he shipped two hundred cars of this clay. Potters who tested it were very much pleased with it, but it did not continue to be marketable to the persons who tested it, after they had purchased and used some of it.

The deed from Mr. Dickinson and his wife to the Alabama Kaolin Company, referred to above, was shown to Mr. Montague, who testified that he was familiar with the Fort Payne land conveyed by this deed, but not with the other tract. In relation to the Fort Payne land he testified as follows.

Mr. Montague had purchased this property at a tax sale in 1901, and again on December 8, 1902, at an auction sale brought about by the bondholders. The witness went on the land in question for the first time in 1888 or 1889, when the Fort Payne Fire Brick Company was building a large firebrick plant there. This plant was operated by this company for a short time, not more than ninety days. This was in 1889. From that time until the Alabama Kaolin Company bought it, about 1897 or 1898, the plant was not operated. The Alabama Kaolin Company, after its purchase, either repaired or replaced the old boilers, which had burned out, and purchased quite an amount of machinery.

The presiding judge in his charge to the jury instructed them that the following portions of the evidence above stated had not been connected with the defendant Foster, and that the jury were not to consider such evidence as against Mr. Foster: the deed from the North Alabama Land and Improvement Company to Mr. Dickinson; the bond of the Alabama Kaolin Company (except so far as Mr. Foster might have testified that this bond was similar to the bond held by him); the receipts from Mr. Dickinson to the International Trust Company, dated October 15, 18 and November 1, 1897.

WM. P. DICKINSON & COMPANY.

The Government called as a witness Abraham A. Rolf, who testified that he was a lawyer, in Chicago, Illinois. The testimony
185 of this witness was as follows, such testimony as was given on cross examination being placed in parentheses:

In 1895, when the witness first knew the defendant Dickinson, Willis P. Dickinson, and his brother, the defendant John W. Dickinson, were doing business under the firm name of W. P. Dickinson & Company. In the early part of 1898, Mr. Rolf, as counsel for W. P. Dickinson, came to Boston and called upon the defendant

John W. Dickinson. Mr. Rolf told Mr. Dickinson that he had come to negotiate in behalf of W. P. Dickinson some agreement in settlement of the partnership difficulties of the firm. He told Mr. Dickinson that the condition in which the partnership affairs then stood was affecting certain matters with which both Mr. Rolf and the firm of W. P. Dickinson & Company were connected; that W. P. Dickinson had told Mr. Rolf that he could not do anything more with these matters because he had quit doing business with his brother John, adding that John had the securities of the firm. Mr. Rolf told John W. Dickinson that he wished to fix the matter up so as to get the benefit of some of these securities, and straighten out the difficulties of the partnership; and Mr. Dickinson said he was perfectly willing to do so.

When Mr. Rolf quoted W. P. Dickinson as saying that he had quit doing business with his brother John, John W. Dickinson replied, "I guess that is right; I wouldn't do business with him," or something to that effect. Mr. Dickinson said he would insist that whatever partnership obligations there were be paid, and Mr. Rolf replied that that was proper, and that W. P. Dickinson insisted on the same thing. (Mr. Dickinson said that the firm owed money in the East.)

After this conversation Mr. Dickinson and Mr. Rolf went to the office of Mr. Dickinson's attorneys, where an agreement was drawn up, two copies being made, and both copies were signed by John W. Dickinson. Mr. Rolf then took both copies back to Chicago, where they were signed by W. P. Dickinson, after which one copy was returned to John W. Dickinson.

(Mr. Rolf did not remember whether or not Mr. Dickinson's remark that he should insist upon the payment of all the part-
186 nership obligations was repeated after he and Mr. Rolf left the office of Mr. Dickinson's attorneys.)

The Government put in evidence a portion of a letter from Mr. Rolf to Mr. Dickinson, dated January 31, 1898, which Mr. Rolf testified accompanied the copy of the agreement which he returned to Mr. Dickinson, as above stated. The Government also put in evidence a letter which Mr. Rolf testified that he received from Mr. Dickinson in reply to the letter of January 31, just mentioned. These letters, so far as they were put in evidence, were as follows:

[A. A. Rolf, attorney at law, Room 76, La Salle st., tel. Main 3212.]

CHICAGO, *Jan. 31, 1898.*

Mr. J. W. DICKINSON,
53 State St., Boston, Mass.

DEAR SIR: Enclosed find your copy of agreement to arbitrate the partnership matters signed by W. P. Dickinson. I have to-day notified your attorneys that I have forwarded you this copy of agreement and that same has been signed. Have also suggested to

them that Mr. W. P. Dickinson suggests that each of the parties to this agreement give a bond of $10,000 and abide by the result of the arbitration.

I wish that you would send me the artesian well pump as per proposition, sending the 10 x 24 with 4 3/4 barrel.

[John W. Dickinson, bonds and mortgages, 53 State street.]

BOSTON, *Feb. 5th, 1898.*

Mr. A. A. ROLF,
125 La Salle st., Chicago, Illinois.

DEAR SIR: Your favor of the 31st ult. at hand, enclosing check for $25, for which please accept thanks.

I could easily give a bond of $10,000, and am satisfied to do it but should exact a bond in return of the same amount that would pass one of our masters-in-chancery.

Very truly yours, JOHN W. DICKINSON.

187 The Government also put in evidence a letter written by John W. Dickinson before 1898 to the South Danvers Bank, showing the letterhead of W. P. Dickinson & Company, and several letters written by Mr. Dickinson to the South Danvers Bank after 1898, showing the letterheads of John W. Dickinson.

The Government put in evidence a portion of a letter from Mr. Dickinson to Mary Fera, dated March 17, 1900, and a letter from Mr. Dickinson to Mr. Von Platem, dated May 8, 1899. These letters, so far as put in evidence, were as follows:

[John W. Dickinson, bonds and mortgages, 53 State street.]

My idea is to handle the assets of the concern of W. P. Dickinson & Company so that all the creditors can be paid in full, but if the assets of that concern are not carefully handled they are likely to shrink very largely. As far as I am concerned, personally, I haven't any money nor sha'n't have for a few days, but shall write Mrs. Dickinson and see if she will advance you some.

Very truly yours.

JOHN W. DICKINSON.

[John W. Dickinson, bonds and mortgages, 53 State street.]

BOSTON, *May 8th, 1899.*

Mr. MAURICE VON PLATEM,
Loomis, near 21st, Chicago, Ills.

DEAR SIR: Your favor of May 3d received. I have had more business than I really could attend to, or should have sent you this statement some time ago. The old concern of W. P. Dickinson & Company has passed out of existence here sometime ago, and I have

got to go over the old books as well as my own, as trustee, to get the account in shape, but just as soon as I can do so, will straighten it out and send you copy.

I had a statement once prepared, at the time Rolf came down to arbitrate the difference between W. P. Dickinson and myself.

I feel much encouraged now that we have got rid of W. P. Dickinson, as I do not believe that any piece of property would succeed with him in it. I know that Mr. Clark feels the same way, and the bondholders down here will feel very different. I have a good many vouchers here in the shape of drafts. Do you want me to send the original vouchers, or do you wish me to send a copy of them?

Very truly yours,

JOHN W. DICKINSON.

188 The Government offered in evidence the writ and record in a suit brought by the Diebold Safe and Lock Company against John W. Dickinson and Willis P. Dickinson, copartners under the firm name of W. P. Dickinson & Company, the writ being dated the eighth day of July, 1898, and the declaration being for $37,681.72. The offer included the return of the officer on the writ, showing service upon the defendant John W. Dickinson. The Government also offered in evidence the record of a judgment entered in the above suit on the fifth day of June, 1899, that the plaintiff recover against John W. Dickinson, the defendant aforesaid, $39,310.33.

The defendant Dickinson, by his counsel, duly and seasonably objected to the admission of the above evidence relating to the suit of the Diebold Safe and Lock Company, on the ground that it was entirely immaterial in the case, and also on the ground that it did not appear that there was any trial or whether judgment was obtained by consent of the defendant, or for any good and sufficient reasons. The presiding judge overruled the objection of the defendant Dickinson and admitted the evidence.

In the charge to the jury the presiding judge instructed them that the following portions of the evidence stated above in connection with W. P. Dickinson & Company had not been connected with the defendant Foster, and that the jury were not to consider such evidence as against the defendant Foster: The letter from Rolf to Dickinson, dated January 31, 1898; the letter from Dickinson to Rolf, dated February 5, 1898; the letter from Dickinson to Mary Fera, dated March 17, 1900; the letter from Dickinson to Von Platem, dated May 8, 1899; and the record of proceedings in the suit of the Diebold Safe and Lock Company.

D. H. FITCH.

Mr. Fitch was called as a witness by the Government and testified as follows:

Mr. Fitch was the father-in-law of the defendant Dickinson. In 1898, 1899, and 1900 he lived in Newton, Massachusetts, and was engaged in the retail provision business.

Notes were shown to the witness which were among those shown by the bank at the time of the suspension, the amounts being
189 $5,000, $3,500, $3,500 and $3,000. Mr. Fitch testified that the signatures were his; that they were signed for the defendant Dickinson, and that no consideration was given for them.

The first time he signed such a note for Mr. Dickinson's accommodation was in 1898. Previous to 1898 Mr. Fitch had had no talk with Mr. Dickinson about his financial standing. Once at least during that year Mr. Dickinson asked him how his business was going, and Mr. Fitch replied that he was not making money, but was perhaps holding his own. He told Mr. Dickinson that he was having trouble in meeting his bills, but thought he would try a year longer and see if he could pull out. During the year 1899 he told Mr. Dickinson that his creditors were pressing him for payments which he would not make. He talked with Mr. Dickinson again in January, 1900, about his business, saying that he was making no money but intended to try it awhile longer. In June, 1900, having previously found himself unable to pay his indebtedness (exclusive of his accommodation notes) he suspended business.

Mr. Fitch testified that he had never paid anything on the accommodation notes.

The following facts appeared on cross examination:

Before 1898 Mr. Dickinson had lent Mr. Fitch $2,000 to put into his business. In 1898 Mr. Fitch still owed Mr. Dickinson this sum. Mr. Dickinson also let Mr. Fitch have about $1,000 more, but Mr. Fitch did not consider this a debt, although he would have paid it if he had had it.

In his talk with Mr. Dickinson about the condition of his business Mr. Fitch told Mr. Dickinson the reason for his financial difficulties, which was that people who owed him bills were slow in paying. He also said that he needed more capital. He never made any detailed statement of his affairs, and Mr. Dickinson never knew how much was due Mr. Fitch from his customers. Mr. Fitch testified that in fact the sums due him, if they all could have been collected, would have been sufficient to pay all his indebtedness.

W. A. GARRATT.

Mr. Garratt was called as a witness for the Government and testified as follows; the portions in parentheses appeared on cross examination:

190 His business was that of a sales agent in the iron and steel business, with an office in Boston. (In the conduct of this business he sold structural steel and pig iron, placing orders for various mills on commission. He also represented the Whiting Foundry Equipment Company and was New England sales agent for that company.)

During 1899 and 1900 his office was in the Exchange Building, in Boston, but it was never on the same floor with Mr. Dickinson's office. (He had known Mr. Dickinson for eight or ten years, and for four or five years before 1898 had done a good deal of business with him as a notebroker, selling him notes which Mr. Garratt received from his customers. This business amounted to $5,000 or more a year. Mr. Garratt ran an open account with Mr. Dickinson from time to time giving Mr. Dickinson notes, and from time to time drawing upon him for various sums on account of the notes.)

Mr. Garratt had signed two accommodation notes for Mr. Dickinson, one for $2,000 and one for $1,000. The $2,000 note was signed first—some time in 1898 or 1899. At that time Mr. Garratt went to Mr. Dickinson's office to get some business paper discounted and Mr. Dickinson asked him to sign the $2,000 note, saying there was to be collateral given for it, and he would take care of it at maturity, but he needed two names on the note. There was similar talk at the time the $1,000 note was signed.

At the time these notes were signed, and afterward, Mr. Garratt never said anything to Mr. Dickinson about his financial responsibility and Mr. Dickinson never asked him. There was no talk on the subject between them.

Mr. Garratt testified that at the time the two accommodation notes were signed he was not financially able to pay them with his other liabilities, and this continued to be true down to May, 1900. He had never made any payments on the notes.

(At the times when the notes were signed Mr. Garratt owed Mr. Dickinson something on the open account between them, but not as much as $2,000, according to Mr. Garratt's recollection.)

GEORGE W. SIAS.

Mr. Sias was called as a witness by the Government and his testimony was as follows:

191 In 1898, 1899, and 1900 he was engaged in the real estate business, and during part of that time was a member of the firm of Foster & Sias. (The Foster of this firm was no relation to the defendant Fos) In 1898 the place of business of the firm was in the Exchange Building, in Boston.

At various times Mr. Sias had signed notes for the accommodation of Mr. Dickinson, and Mr. Dickinson gave him receipts for them. Four such receipts were put in evidence and were as follows:

"Feb. 20, 6 mos., $2,800. Received of George W. Sias note dated as above for which no consideration has been given.

JOHN W. DICKINSON."

"Received from George W. Sias collateral note dated Dec. 16, 1899, for $3,000, due in four months, for which no consideration has been giv .

JOHN W. DICKINSON."

"Received from George W. Sias one collateral note of $3,500 dated March 15, 1899, due in five months, for which no consideration has been given.

JOHN W. DICKINSON, 3/31/99."

"Dec. 11, 1899. Received of George W. Sias note for $1,000, dated Dec. 11, 1899, and due in six months, for which no consideration has been given.

JOHN W. DICKINSON."

Mr. Sias testified that he signed the note referred to in the above receipts. The witness was shown eight notes which were among those at the bank at the time of the suspension, all purporting to be signed "George W. Sias;" and he testified that the signature in each case was in his handwriting. The amounts of these notes were $3,000, $265, $700, $1,000, $1,000, $550, $2,800, and $5,000. Mr. Sias testified that he received consideration for none of these notes except the $265 note, the $550 note, and one of the $1,000 notes.

The first time Mr. Sias signed a note for the accommodation of Mr. Dickinson, Mr. Dickinson told Mr. Sias that he wished him to sign a note, and would give him a card saying there was no consideration given, and when the note came due he would take care of it and pay it. After Mr. Sias had signed two or three such notes, he told Mr. Dickinson one day that he did not consider it good business to be putting out so many notes; Mr. Dickinson said that he would take care of them whenever they came due. Mr. Sias spoke to Mr. Dickinson about it several times, saying that he did not think it was good business to put his name on so much paper. Each time Mr. Dickinson assured him that he would take care of it all right.

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In one of these conversations Mr. Sias told Mr. Dickinson that he was not financially able to pay all these notes and his own indebtedness. Mr. Sias thought this was in 1898 or early in 1899. He did not remember saying this to Mr. Dickinson more than once.

He testified that he had made no payments on account of these accommodation notes; that when the notes fell due Mr. Dickinson sometimes gave him a check, with which he paid the notes at the bank; sometimes Mr. Dickinson paid them himself, and sometimes the notes were renewed.

Mr. Sias was not very well acquainted with Mr. Foster. He first met him in Mr. Dickinson's office in the spring of 1899. This was the only time he ever met Mr. Foster. He had seen Mr. Clark in Mr. Dickinson's office a number of times during 1898, 1899, and 1900.

On cross-examination Mr. Sias testified that the business of the firm of Foster & Sias consisted largely in construction loans. In the conduct of this business Foster & Sias furnished money to persons erecting buildings on land in the suburbs of Boston, receiving a mortgage of the land and buildings as security. Under these mortgages they agreed to advance certain sums of money at certain stages

in the erection of the buildings. They also bought land in the suburbs, cut it into house lots, ran roads through it, and developed the property.

In the course of their business Foster & Sias handled a great deal of money, and they did a large amount of business with Mr. Dickinson for five or six years down to 1900. Mr. Dickinson loaned them money on their notes or got the notes discounted for them. Foster & Sias were accustomed to give Mr. Dickinson notes to be discounted and then to draw upon him from time to time for money as they needed it. All the larger notes which he discounted for them were secured by assignments of mortgages. Occasionally they
193 drew upon him in excess of all notes and security which they had given him.

Mr. Sias further testified on cross-examination that between January 1, 1899, and May 14, 1900, he signed and delivered to Mr. Dickinson a great many notes which were not accommodation notes; that he thought very likely there were fifty such notes during that period. He knew that Mr. Dickinson had these notes discounted at a great many banks besides the South Danvers Bank, including banks in Boston and the First National Bank of Provincetown.

The presiding judge in his charge to the jury instructed them that the receipts above referred to from Mr. Dickinson to Mr. Sias, dated February 20, 1899, March 15, 1899, December 11, 1899, and December 16, 1899, had not been connected with Mr. Foster, and that the jury were not to consider these portions of the evidence as against Mr. Foster.

WALTER H. THORPE.

Mr. Thorpe was called as a witness for the Government and his testimony is stated below, that portion of it which came out in cross-examination being enclosed in parentheses.

He was a lawyer by profession and at the time of the trial had been practising in Boston for thirteen years. In 1898 and 1899 his office was at No. 405 Exchange Building, Boston, in the same suite with Foster & Sias. In 1898 Mr. Dickinson occupied the adjoining office, No. 406. The names of Foster & Sias and W. H. Thorpe were on the door of 405.

Mr. Thorpe had known Mr. Dickinson since 1896. (At that time Mr. Thorpe had $1,500 worth of notes which he wished discounted, and on the recommendation of another man he took the notes to Mr. Dickinson as a note broker. Mr. Dickinson purchased the notes. From that time down to 1901 Mr. Dickinson from time to time discounted other notes for Mr. Thorpe.)

Mr. Thorpe first met Mr. Foster in 1899 or possibly 1898. Mr. Dickinson brought Mr. Foster into Mr. Thorpe's office and introduced him to Mr. Thorpe, and Mr. Thorpe took Mr. Foster's affidavit in a matter connected with some claim of the Penacook Manufactur-

ing Company or the Plumbers' Woodworking Company. Mr.
194 Thorpe never met Mr. Foster again until after the suspension of the bank. He had seen Mr. Foster in Mr. Dickinson's office on some occasions before the meeting above described.

Mr. Thorpe was shown two notes for $2,000 and $6,000, which were held by the South Danvers Bank at the time of the suspension, and he testified that they bore his signature. The originals, of which these notes were renewals, were signed by Mr. Thorpe at Mr. Dickinson's request and for his accommodation, and in each case Mr. Dickinson gave Mr. Thorpe a receipt. These receipts were put in evidence and were substantially similar to those appearing above in the testimony of Mr. Sias.

The $2,000 note was signed first. This was in September, 1898. At that time Mr. Dickinson told Mr. Thorpe that he wished to raise money for the Alabama Kaolin Company, and that he would take care of the note at maturity. He said that he expected to make a lot of money out of the Kaolin Company, and that there would be no trouble about paying the note at maturity. There was no talk at that time about Mr. Thorpe's financial responsibility.

Mr. Thorpe testified that he did not have sufficient means to pay the $2,000 note, and that he had never paid anything on either note.

In December, 1898, Mr. Thorpe offered Mr. Dickinson a note of a third person, and Mr. Dickinson declined to buy it. Mr. Thorpe said, "I am confident the note is good, and while I do not suppose my indorsement is of any value, simply to show my good faith in the matter, I will indorse it if you will take it." Mr. Dickinson replied that Mr. Thorpe's indorsement would make it a good deal better, and with that indorsement he would take the note. Accordingly Mr. Thorpe indorsed it, and then Mr. Dickinson bought it.

Before May, 1900, he never showed Mr. Dickinson any property that he owned to the amount of $500, or told Mr. Dickinson of any such property. (Mr. Thorpe never told Mr. Dickinson that he was not financially able to meet the accommodation notes. So far as Mr. Thorpe knew, Mr. Dickinson thought he was responsible to the amount of the notes.)

The presiding judge, in his charge to the jury, instructed them that the receipts above referred to from Mr. Dickinson to Mr.
Thorpe, dated September 6, 1898, February 20, 1898, and
195 January 3, 1900, had not been connected with Mr. Foster, and that the jury were not to consider these portions of the evidence as against Mr. Foster.

The presiding judge also instructed the jury that they should attach no weight to the fact that any of the notes referred to in the evidence were accommodation notes.

EXCEPTIONS OF THE DEFENDANT DICKINSON.

Exception 5: The defendant Dickinson, by his counsel, duly and seasonably objected to each and every separate portion of the evidence above stated, beginning on page 123 [160] of this bill of excep-

tions, relating to W. P. Dickinson & Company, Penacook Manufacturing Company, Plumbers' Woodworking Company, the Alabama Kaolin Company, Foster & Sias, Fitch, Garratt, Schneider, Sias and Thorpe (except such portions as are stated above to have appeared on cross examination), on the ground in each case that the evidence in question had no sufficient legal bearing on the transactions complained of in the indictment or the issues properly involved in the trial thereof; that the evidence was immaterial or remote; that it was not sufficiently connected with the defendants; that it was not sufficiently connected with the transactions complained of in the indictment; that it tended to complicate the issue, and that it tended to prejudice the jury.

In the case of certain portions of the above evidence, the objections of the defendant Dickinson were based also upon certain special or additional grounds, which have been stated above in connection with those portions of the evidence.

The presiding judge in each case overruled the objection of the defendant Dickinson and admitted the evidence. The defendant Dickinson in each case, by his counsel, duly and seasonably excepted to the admission of the evidence in question, and his exceptions were duly noted.

The defendant Dickinson prays that he may have the same benefit of his exceptions to the admission of this testimony as if those exceptions had been stated in this bill of exceptions separately in connection with each and every portion of the evidence as stated above on pages 163 to 195.

A considerable portion of the evidence above stated, bearing
196 on the financial responsibility of the makers of notes discounted at the South Danvers Bank through Mr. Dickinson, consists of papers, documents, etc., introduced as exhibits, as has appeared in the statement of the evidence. The exhibits were included in the obligations of the defendant Dickinson, just above stated, and in the exceptions allowed by the presiding judge. Such of these exhibits as have not been fully set out, nor copies of them attached to this bill of exceptions, contained nothing in or upon them tending to render them admissible in evidence which does not clearly and definitely appear by the description of the said exhibits given above.

Evidence was introduced on behalf of the defendants tending to explain, contradict, and rebut the Government's evidence above stated in connection with the makers of notes placed in the bank by Mr. Dickinson, and the statements made by Mr. Dickinson in his interviews with the directors of the bank which have appeared above. This evidence need not be stated, as it has no material bearing on the questions raised by the exceptions of the defendant Dickinson which are incorporated in this bill of exceptions.

SCHEDULES.

In the course of the trial the Government produced a number of schedules prepared by the bookkeeper, Taylor. As to each of these

schedules Mr. Taylor testified that he had prepared it from the entries on the books of the South Danvers Bank, and that to the best of his knowledge and belief it was correct. These schedules were used by the witness Taylor to refresh his recollection in testifying to various transactions at the bank and various notes discounted there, and were also put in evidence in behalf of the Government, and marked as exhibits in the case and taken by the jury to the jury room.

The various books of the bank referred to in the testimony above, including the ledger, cash book, discount book, journal, and two pencil books, and the Bushby Record Book, were also put in evidence and taken by the jury to the jury room, the jury being instructed that only such entries in the books as had been referred to in the testimony were to be examined.

The schedules above referred to include the following, which
197 for convenience will be referred to by the numbers assigned to them as exhibits.

Exhibit 47: Twenty-four schedules fastened together. The first of these schedules was headed as follows:

"List of notes entered on books of the South Danvers National Bank against the name of John W. Dickinson as discounted, with the date of each entry, and with the dates of the entries of maturity and payment of each of said notes when entered as paid in said books, and amounts of such notes appearing unpaid at different dates. Notes numbered for convenience of reference. When the proceeds of said notes appear in the list of deposits in the cash book, the amount is marked in this list as deposited."

Below this heading were certain columns of words and figures, being the same which appear in the table given above on page 48 [95]. At the end of the schedule there was written the following:

"Date of discount taken from cash book.
Maturity of note taken from discount book.
Payment of note taken from cash book."

The second schedule in Exhibit 47 was headed "Amount of John W. Dickinson's notes held by bank at different dates." Below this heading there followed certain columns of words and figures, being the same appearing in this bill of exceptions on page 50 [97].

The other twenty-two schedules included in Exhibit 47 consisted of schedules similar to the two just described, except that they had to do respectively with the notes of John W. Dickinson, trustee; W. P. Dickinson & Company, Penacook Manufacturing Company, Alabama Kaolin Company, Plumbers' Woodworking Company, Foster & Sias, Fitch, Garratt, Schneider, Sias and Thorpe.

Exhibit 48: A schedule bearing the following heading:

"Statement of amount of notes of certain parties appearing by the books of the South Danvers National Bank to have been discounted by it, and to be held by it on the morning of the dates specified on the statement, numbered for convenience of designation."

Below this heading there followed certain dates, and under each date certain columns of names and figures, being the same which appear in this bill of exceptions on pages 41 [88] to 44 [92].

Exhibit 49: A schedule, of which a copy is annexed to this bill of exceptions as "Appendix A."

198 Exhibit 50: A schedule, of which a copy is annexed to this bill of exceptions as "Appendix B."

Exhibit 51: A schedule, of which a copy is annexed to this bill of exceptions as "Appendix C."

In the course of the trial it was brought out in evidence for the defendants that there was an error of $1,000 in schedule 51, one of $5,000 in schedule 47, and one of less than $5,000 in one of the other schedules, which tended to charge the above amounts against Dickinson.

Exception 6: The defendant Dickinson by his counsel duly and seasonably objected to the admission of each of the above schedules in evidence, on the ground that the matters therein referred to should properly be proved by the testimony of witnesses, referring to such schedules, if necessary, to refresh their memory, and by the books of the bank; and that it was improper and prejudicial to the defendant Dickinson to place in the jury's hands, in writing, a part of the Government's case, as would be done by admitting these schedules in evidence as exhibits.

The presiding judge overruled these objections in each case and admitted the schedules in evidence, and the defendant Dickinson by his counsel in each case duly and seasonably excepted and his exceptions were duly noted.

The defendant Dickinson prays that he may have the same benefit from these exceptions as if he had in this bill of exception stated the said exceptions separately in connection with each of the schedules above referred to.

The foregoing statement of evidence contains all the evidence introduced at the trial which is material in any way to any of the questions raised by such of the exceptions of the defendant Dickinson as are incorporated in this bill of exceptions.

The defendant John W. Dickinson presents this bill of exceptions to the court, and requests that the same be allowed, signed and sealed.

JOHN W. DICKINSON.

Allowed August 10, 1906.

FREDERIC DODGE,
Judge U. S. District Court.

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APPENDIX A.

(Exhibit 49.)

Statement of account on certain dates of J. W. Dickinson, with South Danvers National Bank appearing on book of balances of said Bank.

Date.	Bal.	Checks.	Deposits.	Balance.
1899.				
June 10	$681.14	$1,939.60	$1,500.00	$626.54
June 13	326.54	53.00	750.00	63.36
		237.18	6,000.00	
		450.00	2,500.00	
		4,000.00		
		723.00		
July 1	201.83	180.00		21.83
" 7	229.26	295.00	50.00	13.47
		1.83	210.00	
		150.90		
		26.66		
		1.40		
" 11	746.21	7.50		288.68
		8.28		
		400.00		
		30.00		
		1.75		
		15.00		
Nov. 7	129.79	200.00	1,500.00	451.73
		180.00	743.00	
		900.00	1,940.00	
		1,500.00	485.00	
		1,500.00		
		66.06		
Nov. 27	80.05	514.37	681.45	147.13
		100.00		
Nov. 28	147.13	560.00	971.67	1,391.90
		147.98	981.17	
Dec. 15	53.13			53.13
" 16	53.13			53.13
1900.				
Jan. 17	135.35			135.35
" 18	135.35	450.00	1,960.00	145.35
		400.00		
		1,100.00	240.00	44.10
" 24	10.35	556.25	350.00	
				120.26
" 31	120.26	250.00	5,818.80	190.67
Feb. 15	120.87	2,500.00	1.00	
200				
Feb. 15		3,000.00		
" 21	46.34	240.00	2,715.44	6.78
		15.00		
		2,500.00		
Mar. 19	8.63		96	104.63
May 14	Overdraft 10,888.57	2,488.00		Overdraft 13,754.40
		230.00		
		18.29		
		44.54		
		85.00		

APPENDIX B.

(Exhibit 50.)

Statement of certain charges and credits on certain dates to the account of John W. Dickinson on the books of daily balances of the South Danvers National Bank, together with a statement of certain

amounts and the names opposite them, entered on said dates in the cash book of said bank under "Notes Discounted."

Date.	Charges.	Credits.	Name.	Amounts.
1899.				
June 13	$4,000.00	$3,000.00	J. W. Dickinson, trustee	$6,000
	4,500.00	2,500.00	Penacook Mfg. Co	2,500
Sept. 1	2,000.00	1,000.00	Alabama Kaolin Co	10,000
" 1	1,900.00			
" 1	3,200.00			
Nov. 10	1,800.00	1,949.60	Highland Foundry Co	2,000
1900.				
Feb. 1	4,000.00	5,818.80	W. H. Thorpe	4,000
Jan. 30	4,500.00	3,420.68	D. H. Fitch	3,500
1899.				
Dec. 19	2,500.00	2,939.40	George W. Sias	3,000
1900.				
	2,500.00	5,818.80	W. P. Dickinson & Co	6,000
	3,000.00			
Feb. 13	2,500.00	3,879.33	Penacook Mfg. Co	4,000
	1,750.00			
Feb. 17	1,721.50	3,883.20	J. W. Dickinson, trustee	4,000
Feb. 17	1,000.00			
Mar. 24	3,537.92	3,885.20	W. A. Garratt	4,000
		3,482.50	D. H. Fitch	3,500
		4,865.67	George W. Sias	5,000
		1,949.60	J. W. Dickinson	2,000
		1,946.27	J. W. Dickinson, trustee	2,000
Feb. 21	2,500.00	2,715.44	George W. Sias	2,800
May 14	2,488.00			

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APPENDIX C.

(Exhibit 51.)

Statement of entries in the journals of the South Danvers National Bank under certain dates of payments to Boston clearing house against the name of John W. and J. W. Dickinson, which are not charged in the books of the bank to said Dickinson on such dates, and dates under which the amounts of such payments are charged to his account in book of daily balances.

Journal page.	Date.	Amount.	Date.	Amount.
259	June 10,1899	$4,000.00	June 13,1899	$4,000.00
356	July 1,1899	2,000.00	Sept. 1,1899	2,000.00
384	July 7,1899	1,900.00	Sept. 1,1899	1,900.00
404	July 11,1899	3,200.00	Sept. 1,1899	3,200.00
130	Nov. 1,1899	1,800.00	Nov. 10,1899	1,800.00
234	Nov. 27,1899	4,000.00	Feb. 1,1900	4,000.00
242	Nov. 29,1899	4,500.00	Jan. 30,1900	4,500.00
328	Dec. 15,1899	2,500.00	Dec. 19,1899	2,500.00
332	Dec. 16,1899	2,500.00	Feb. 15,1900	2,500.00
500	Jan. 17,1900	1,750.00	Feb. 13,1900	1,750.00
536	Jan. 24,1900	1,721.50	Feb. 17,1900	1,721.50
565	Jan. 31,1900	1,000.00	Feb. 17,1900	1,000.00
780	Mar. 19,1900	3,537.92	Mar. 24,1900	3,537.92

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SENTENCE.

And now, on this tenth day of August, A. D. 1906, it is considered by the court that the said John W. Dickinson be imprisoned in the jail at Dedham, in the county of Norfolk, in said district, for the term of nine years, and to stand committed until this sentence be performed.

Petition for writ of error of John W. Dickinson.

(Filed August 10, 1906.)

District Court of the United States, District of Massachusetts.

UNITED STATES *vs.* GEORGE M. FOSTER AND JOHN W. DICKINSON.	No. 180 on the Criminal Docket.

And now comes John W. Dickinson, one of the defendants in the above-entitled cause, and complains that in the record and proceedings and also in the rendition of judgment in a plea between the United States and the said defendant, tried in the District Court of the United States for the said District, at the September Term, A. D. 1902, in which a judgment was rendered against him on the tenth day of August, 1906, manifest error hath intervened to the great damage of the said defendant.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the United States Circuit Court of Appeals for the First Circuit aforesaid.

JOHN W. DICKINSON.

203 *Assignment of errors of John W. Dickinson.*

(Filed August 10, 1906.)

District Court of the United States, District of Massachusetts.

UNITED STATES *vs.* GEORGE M. FOSTER AND JOHN W. Dickinson.	No. 180 on the Criminal Docket.

Now comes the defendant John W. Dickinson and says that the record and proceedings of the District Court of the United States for the district of Massachusetts in the above-entitled case there is manifest error, to wit:

1. The said District Court has erred in overruling the demurrer to the indictment filed by the defendant Dickinson on March 22, 1901, because:

(a) The said indictment does not, nor does any one of the several counts thereof, set forth with clearness and with that reasonable certainty required by law the offence or offences with which he, the said John W. Dickinson, stands charged.

(b) The said indictment and each and every one of the several counts thereof is uncertain and vague and lacks the certainty and particularity to which the said defendant John W. Dickinson is by

law entitled, to inform him as to the charge or charges against him and to enable him to prepare his defence and duly protect him by any judgment which might be rendered upon said indictment or upon any of the several counts thereof.

(*c*) The said indictment does not, and no count thereof does, state with sufficient definiteness and apprise him, the said John W. Dickinson, with that reasonable certainty required by law what were the matters and things and property which the said defendant George M. Foster stands charged with having wilfully misapplied by an unlawful and fraudulent conversion thereof to the use, benefit,
204 and advantage of him, the said John W. Dickinson, and which he, the said John W. Dickinson, stands charged with having aided and abetted the said Foster to wilfully misapply in the manner and form aforesaid.

(d) The said indictment and each and every count thereof charges that the said defendant George M. Foster did wilfully misapply divers (but to him, the said John W. Dickinson, unknown) matters and things by unlawfully and fraudulently converting the same to the use, benefit, and advantage of him, the said John W. Dickinson, and that he, the said John W. Dickinson, did unlawfully and fraudulently aid and abet the said George M. Foster to do and commit the said offence or offences of wilfully misapplying such matters and things in the manner and form aforesaid; but the said indictment does not, nor does any one of the several counts thereof, contain, as required by law, averment or averments to show how such alleged misapplication or misapplications was or were made, and that it or they or any of them was or were unlawful within the meaning of section 5209 of the Revised Statutes of the United States.

(e) The said indictment and each and every count thereof charges that the said defendant George M. Foster did wilfully misapply divers (but to him, the said John W. Dickinson, unknown) matters and things by unlawfully and fraudulently converting the same to the use, benefit, and advantage of him, the said John W. Dickinson, and that he, the said John W. Dickinson, did aid and abet the said George M. Foster to do and commit the said offence or offences of wilfully misapplying such matters and things in the manner and form aforesaid; but the said indictment and each and every count thereof fails to specify, as is required by law, the particulars of the said George M. Foster's application and applications of such matters and things, so as to distinguish the application and applications charged in the said indictment and in the several counts thereof as wilful and criminal misapplication and misapplications from other application and applications of such matters and things that might be lawful or that might be unlawful but not criminal within the meaning of section 5209 of the Revised Statutes of the United States.

(f) The said indictment and the several counts thereof seek
205 to charge him, the said John W. Dickinson, with aiding and abetting an officer of a national bank in wilfully misapplying

the funds of said bank, but do not, as is required by law, state facts showing a misapplication of the funds of such bank by such officer in such a manner as to constitute a criminal offence under the provisions of section 5209 of the Revised Statutes of the United States.

(g) The said indictment does not, nor does any one of the several counts thereof, charge any offence against the said defendant George M. Foster with that reasonable certainty required by law, and does not charge with that reasonable certainty required by law the commission of any offence by said defendant George M. Foster in the doing or commission of which he, the said John W. Dickinson, aided and abetted as charged in the said indictment and in the several counts thereof.

2. The said District Court has erred in overruling the additional causes or grounds of demurrer to the said indictment filed by the defendant Dickinson on March 23, 1901, because:

(a) The said indictment and each and every one of the several counts thereof is bad, because the said indictment does not, nor does any one of the several counts thereof, state and set forth with such certainty and particularity as to satisfy the requirements of the Sixth Amendment of the Constitution of the United States the offence or offences with which he, the said John W. Dickinson, stands charged and which he stands charged with having aided and abetted the said defendant George M. Foster to do and commit.

(b) The said indictment and each and every one of the several counts thereof is bad, because the said indictment is not, nor is any one of the several counts thereof, sufficiently explicit in its allegations to satisfy the requirements of the Sixth Amendment of the Constitution of the United States by which a person accused of a crime is entitled to be informed of the nature and cause of the accusation.

3. The said District Court has erred in overruling the demurrer to the indictment of the defendant Dickinson filed on March 22, 1901, and the additional grounds of demurrer filed by the defendant Dickinson on March 23, 1901, for the reasons and grounds set forth in the said demurrer and the said additional grounds of demurrer
206 as appearing in the record of this cause, to which reference is hereby made.

4. The said District Court has erred in allowing the United States to introduce under the sixth count of said indictment evidence tending to show a misapplication of moneys, funds and credits on December 16, 1899, as more particularly set forth on pages 16 [69], 19 [71] and 20 [72] of the bill of exceptions in this case, reference to which is hereby made, whereas the said sixth count alleged a misapplication on February 15, 1900.

5. The said District Court has erred in allowing the United States to introduce under the tenth count of said indictment evidence tending to show a misapplication of $1800, as more particularly set forth on pages 16 [69], 19 [71] and 21 [73] of the bill of exceptions in this

ase, reference to which is hereby made, whereas the said tenth count alleged a misapplication of $1500.

6. The said District Court has erred in excluding the letter from the Deputy and Acting Comptrolier of the Currency to the president of the South Danvers National Bank, dated June 14, 1900, offered in evidence by the defendants, a copy of which letter appears on pages 115 [156] to 118 [158] of the bill of exceptions in this case, reference to which is hereby made, it appearing that the said letter was duly received by the said South Danvers National Bank.

7. The said District Court has erred in excluding a copy of the letter written by the directors of the South Danvers National Bank to the Comptroller of the Currency, dated June 18, 1900, offered in evidence by the defendants, a copy of which letter appears on pages 118 [158] to 120 [159] of the bill of exceptions in this case, reference to which is hereby made, it being admitted by the United States that the said letter from the directors of the bank was duly signed by the said directors and mailed to the Comptroller, and no objection being made on the ground that a copy of the said letter, and not the original, was offered in evidence.

8. The said District Court has erred in excluding at a subsequent point in the trial, during the direct examination of the defendant Dickinson, a copy of the said letter from the directors to the Comptroller offered in evidence by the defendant Dickinson, the defendant Dickinson having examined the said copy and having testified
207 that in June, 1900, he had a conversation with Mr. Clark, president of the South Danvers National Bank, during which Mr. Clark exhibited to him an original letter to the Comptroller of the Currency, of which the said copy offered in evidence as aforesaid and examined by the defendant Dickinson as aforesaid was a true copy, and having further testified that at that time he, the said defendant, discussed the contents of the letter with the said Clark. Counsel for the United States waived any objection on the ground that the paper offered was a copy, and waived any proof that the original letter was mailed.

9. The said District Court has erred in admitting against the objections of the defendants the evidence introduced by the United States and each and every part thereof as to the financial responsibility of the Penacook Manufacturing Company, the substance of which evidence is fully set forth in the bill of exceptions in this case on pages 125 [163] to 146 [178] thereof, reference to which is hereby made.

10. The said District Court has erred in admitting against the objections of the defendants the evidence introduced by the United States and each and every part thereof as to the financial responsibility of the Plumbers' Woodworking Company, the substance of which evidence is fully set forth in the bill of exceptions in this case on pages 146 [178] to 150 [181], reference to which is hereby made.

11. The said District Court has erred in admitting against the objections of the defendants the evidence introduced by the United

States and each and every part thereof as to the financial responsibility of the Alabama Kaolin Company, the substance of which evidence is fully set forth in the bill of exceptions in this case on pages 150 [181] to 154 [184], reference to which is hereby made.

12. The said District Court has erred in admitting against the objections of the defendants the evidence introduced by the United States and each and every part thereof as to the financial responsibility of W. P. Dickinson & Company, the substance of which evidence is fully set forth in the bill of exceptions in this case on pages 154 [184] to 159 [188], reference to which is hereby made.

13. The said District Court has erred in admitting against the objections of the defendants the evidence introduced by the
208 United States and each and every part thereof as to the financial responsibility of D. H. Fitch, the substance of which evidence is fully set forth in the bill of exceptions in this case on page 160 [189], reference to which is hereby made.

14. The said District Court has erred in admitting against the objections of the defendants the evidence introduced by the United States and each and every part thereof as to the financial responsibility of W. A. Garratt, the substance of which evidence is fully set forth in the bill of exceptions in this case on page 162 [190], reference to which is hereby made.

15. The said District Court has erred in admitting against the objections of the defendants the evidence introduced by the United States and each and every part thereof as to the financial responsibility of George W. Sias, the substance of which evidence is fully set forth in the bill of exceptions in this case on page 163 [191] to [193] thereof, reference to which is hereby made.

16. The said District Court has erred in admitting against the objections of the defendants the evidence introduced by the United States and each and every part thereof as to the financial responsibility of Walter H. Thorpe, the substance of which evidence is fully set forth in the bill of exceptions in this case on pages 166 [193] to 167 [195], reference to which is hereby made.

17. The said District Court has erred in admitting against the objections of the defendants the testimony of Michael J. O'Brien, a witness called by the United States, as to certain transactions and certain statements of the defendant Dickinson in connection with the Penacook Manufacturing Company, being the testimony which is set forth in substance in the bill of exceptions in this case in the last eight [four] lines on page 126 [163] and the first ten [thirteen] lines on page 127 [164] thereof, reference to which is hereby made.

18. The said District Court has erred in admitting against the objections of the defendants the testimony of the said Michael J. O'Brien as to a conversation between the witness and the defendant Dickinson some time before October, 1897, regarding the prospect for the payment of certain notes of the Penacook Manufacturing Company indorsed by the said O'Brien and by the defendant Dickinson, and discounted at the Shawmut Bank, the substance of this

209 testimony being fully set forth in the bill of exceptions in this case, beginning in the last line [fourth] on page 126 [164] and ending in the ninth [twelfth] line on page 127 [164] thereof, reference to which is hereby made.

19. The said District Court has erred in admitting against the objections of the defendants the testimony of Herbert M. DeLanoie and of Pitt J. Baker, witnesses called by the United States, regarding the negotiation by the said Baker of a mortgage of the plant of the Penacook Manufacturing Company to the Knickerbocker Trust Company, the substance of which testimony is fully set forth in the bill of exceptions in this case from the seventeenth [twelfth] to the twenty-fifth [twentieth] line on page 128 [165] thereof, reference to which is hereby made.

20. The said District Court has erred in admitting against the objections of the defendants the testimony of the said Pitt J. Baker as to the negotiations between him and the defendant Dickinson in connection with Mr. Dickinson's renewal of his connection with the Penacook Manufacturing Company, the substance of which testimony is fully set forth in the bill of exceptions in this case in the last eight lines on page 128 and the first seven lines on page 129 [lines 21 to 33, page 165] thereof, reference to which is hereby made.

21. The said District Court has erred in admitting against the objections of the defendants the evidence introduced by the United States as to the payments made to the Knickerbocker Trust Company on account of the mortgage of the Penacook Manufacturing Company, the substance of which testimony is fully set forth in the bill of exceptions in this case in the next to the last paragraph [second] on page 129 [166] thereof, reference to which is hereby made.

22. The said District Court has erred in admitting against the objections of the defendants the testimony of the said Pitt J. Baker regarding conversations and negotiations between Mr. Baker and the defendant Dickinson from October, 1897, to January, 1898, resulting in the assumption by Mr. Baker of the management of the Penacook Manufacturing Company, the said evidence being fully set forth in the bill of exceptions in this case on pages 127 [164] to 128 [165], reference to which is hereby made.

210 23. The said District Court has erred in admitting in evidence against the objections of the defendants the annual return of the Penacook Manufacturing Company of May 1, 1899, set forth at length in the bill of exceptions in this case on pages 142 [175] to 143 [176], reference to which is hereby made.

24. The said District Court has erred in admitting against the objections of the defendants the evidence as to the purchase by the defendant Dickinson of the plant afterwards operated by the Penacook Manufacturing Company, the organization of the said company, and the transfer of the said plant to the said company, the substance of this evidence being fully set forth on pages 125 [163] to 126

[164] in the bill of exceptions in this case, reference to which is hereby made.

25. The said District Court has erred in admitting in evidence against the objections of the defendants the bond given by Mr. Dickinson and Mr. McDowell in connection with the assumption by Mr. Baker of the control of the Penacook Manufacturing Company, as described on pages 127 [164] and 128 [165] of the bill of exceptions in this case, reference to which is hereby made.

26. The said District Court has erred in admitting in evidence against the objections of the defendants the bond given by Mr. Baker and Mr. Champion to the defendant Dickinson in January, 1898, as described on page 128 [164–165] of the bill of exceptions in this case, reference to which is hereby made.

27. The said District Court has erred in admitting in evidence against the objections of the defendants the record of a suit filed by the Mechanics' National Bank against the Penacook Manufacturing Company, John W. Dickinson and Michael J. O'Brien, as described on page 133 [169] of the bill of exceptions in this case, reference to which is hereby made.

28. The said District Court has erred in admitting in evidence against the objections of the defendants a certain letter from the defendant Dickinson to the Knickerbocker Trust Company, dated April 20, 1899, a copy of which letter is set forth at length on pages 138 [172] and 139 [173] of the bill of exceptions in this case, reference to which is hereby made.

29. The said District Court has erred in admitting in evi-
211 dence against the objections of the defendants a certain letter from the defendant Dickinson to P. J. Baker, dated March 6, 1900, a copy of which letter is set forth at length on pages 140 [174] to 142 [175] of the bill of exceptions in this case, reference to which is hereby made.

30. The said District Court has erred in admitting in evidence against the objections of the defendants a certain letter from the defendant Dickinson to the Knickerbocker Trust Company, dated December 30, 1899, a copy of which letter is set forth at length on page 145 [177] of the bill of exceptions in this case, reference to which is hereby made.

31. The said District Court has erred in admitting in evidence against the objections of the defendants a certain certificate of incorporation of the Alabama Kaolin Company, dated September 9, 1897, and a certain deed from John W. Dickinson to the Alabama Kaolin Company, dated September 29, 1897, and a certain deed dated April 27, 1898, from John W. Dickinson and wife to the Alabama Kaolin Company, all these papers being more fully described on pages 150 [181] and 151 [182] in the bill of exceptions in this case, reference to which is hereby made.

32. The said District Court has erred in admitting in evidence against the objections of the defendants a certain mortgage from the Alabama Kaolin Company to the International Trust Company, of

Boston, of all the property of the former company, reciting that the said mortgage was to secure an issue of bonds to the amount of $100,000.

33. The said District Court has erred in admitting in evidence against the objections of the defendants three receipts signed by John W. Dickinson, running to the International Trust Company, dated October 15, October 18, and November 1, 1897, and acknowledging the receipt of bonds of the Alabama Kaolin Company to the amount of $20,000, $10,000 and $70,000, respectively.

34. The said District Court has erred in admitting in evidence against the objections of the defendants the testimony of Dwight P. Montague, a witness called by the United States, regarding the history, character and value of a certain tract of land owned by the Alabama Kaolin Company, the substance of which testimony
212 is fully set forth in the bill of exceptions in this case on pages 152 [182] to 153 [184], to which reference is hereby made.

35. The said District Court has erred in admitting in evidence against the objections of the defendants the testimony of Dwight P. Montague, a witness called by the United States, as to a certain other tract of land owned by the Alabama Kaolin Company, the substance of which testimony is fully set forth in the bill of exceptions in this case on page 154 [184], to which reference is hereby made.

36. The said District Court has erred in admitting in evidence against the objections of the defendants a certain deed from the North Alabama Land & Development Company to John W. Dickinson, dated September 6, 1897, more particularly described on page 150 [181] of the bill of exceptions in this case, reference to which is hereby made.

37. The said District Court has erred in admitting in evidence against the objections of the defendants the testimony in chief of one Abraham A. Rolf, a witness called by the United States, concerning conversations and negotiations between Mr. Rolf and the defendant Dickinson in connection with the affairs of W. P. Dickinson & Company, the substance of which testimony is fully set forth in the bill of exceptions in this case on pages 154 [184] and 155 [185], reference to which is hereby made.

38. The said District Court has erred in admitting in evidence against the objections of the defendants a portion of a letter from the said Abraham A. Rolf to the defendant Dickinson, dated January 31, 1898, and a letter of the defendant Dickinson to the said Rolf dated February 5, 1898. Said letters so far as introduced in evidence are set forth at length in the bill of exceptions in this case on pages 156 and 157 [186], reference to which is hereby made.

39. The said District Court has erred in admitting in evidence against the objections of the defendants a portion of a letter from the defendant Dickinson to Mary Fera, dated March 17, 1900, which portion of letter is fully set forth in the bill of exceptions in this case on page 157 [187], reference to which is hereby made.

40. The said District Court has erred in admitting in evidence against the objections of the defendants a letter from the defendant Dickinson to Maurice Von Platem, dated May 8, 1899, said letter being set forth at length in the bill of exceptions in this case on pages 157 to 158 [187], reference to which is hereby made.

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41. The said District Court has erred in admitting in evidence against the objections of the defendants the writ and record in a suit brought by the Diebold Safe & Lock Company against John W. Dickinson and Willis P. Dickinson, said record being more particularly described on page 158 [188] of the bill of exceptions in this case, reference to which is hereby made.

42. The said District Court has erred in admitting against the objections of the defendants the testimony of D. H. Fitch, a witness called by the United States, to the effect that certain notes signed by him and discounted by the South Danvers Bank were signed for the accommodation of the defendant Dickinson, and that the said Fitch received no consideration for the said notes.

43. The said District Court has erred in admitting against the objections of the defendants the testimony of W. A. Garratt, a witness called by the United States, to the effect that the witness signed certain notes for the accommodation of the defendant Dickinson, the substance of which testimony is fully set forth on page 161 [190] of the bill of exceptions in this case, reference to which is hereby made.

44. The said District Court has erred in admitting against the objections of the defendants the testimony of George W. Sias, a witness called by the United States, to the effect that certain notes signed by him and held by the South Danvers Bank at the time of its suspension were signed for the accommodation of the defendant Dickinson, and that the witness received no consideration for them.

45. The said District Court has erred in admitting in evidence against the objections of the defendants four receipts signed by the defendant Dickinson, running to George W. Sias, copies of which receipts are set forth on pages 162 and 163 [191] of the bill of exceptions in this case, reference to which is hereby made.

46. The said District Court has erred in admitting against the objections of the defendants the testimony of Walter H. Thorpe, a witness called by the United States, to the effect that two notes signed by him and held by the South Danvers Bank at the time of its suspension were renewals of notes which were signed by the witness for the accommodation of the defendant Dickinson.

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47. The said District Court has erred in admitting in evidence against the objections of the defendants certain receipts signed by the defendant Dickinson, dated September 6, 1898, February 20, 1898, and January 3, 1900, running to Walter H. Thorpe, more particularly described on pages 166 and 167 [194] of the bill of exceptions in this case, reference to which is hereby made.

48. The said District Court has erred in admitting in evidence against the objections of the defendants a certain schedule known in

the case as Exhibit 47 and more particularly described on pages 169 and 170 [197] of the bill of exceptions in this case, reference to which is hereby made. Portions of this schedule are set for that length on page 48 [195] and pages 50 [197] to 58 [109] of the bill of exceptions.

49. The said District Court has erred in admitting in evidence against the objections of the defendants a certain schedule known in the case as Exhibit 48, which is fully set forth on page 170 [197] and pages 41 [88] to 44 [92] of the bill of exceptions in this case, reference to which is hereby made.

50. The said District Court has erred in admitting in evidence against the objections of the defendants a certain schedule known in the case as Exhibit 49, which is set forth at length on pages 172 [199] and 173 [200] of the bill of exceptions in this case, reference to which is hereby made.

51. The said District Court has erred in admitting in evidence against the objections of the defendants a certain schedule known in the case as Exhibit 50, which is set forth at length on page 174 [200] of the bill of exceptions in this case, reference to which is hereby made.

52. The said District Court has erred in admitting in evidence against the objections of the defendants a certain schedule known in the case as Exhibit 51, which is set forth at length on page 175 [201] of the bill of exceptions in this case, reference to which is hereby made.

53. The said District Court has erred in overruling the motion in arrest of judgment filed by the defendant Dickinson on March
215 23, 1905, because the verdict against said defendant was found by a so-called jury consisting of ten (10) jurors only, contrary to the Constitution and laws of the United States, and because no judgment could lawfully be rendered upon said verdict.

54. The said District Court has erred in rendering judgment and imposing sentence against the defendant Dickinson upon the verdict rendered in this case on March 20, 1903, because the said verdict was found by a so-called jury consisting of ten (10) jurors only, and not by a jury of twelve (12) jurors, as required by the Constitution and laws of the United States, and because no judgment against the said defendant could lawfully be rendered on said verdict.

JOHN W. DICKINSON.

Bond on writ of error.

(Filed August 10, 1906.)

Know all men by these presents, that we, John W. Dickinson, of Boston, in the District of Massachusetts, as principal, and Alexander C. Chisholm and Joseph I. Stewart, both of Boston, and William O. Tuttle and George H. Shapley, both of Newton, and all in said district, as sureties, are held and firmly bound unto the United States

of America in the full and just sum of two hundred dollars to be paid to the said United States of America or its attorney, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this tenth day of August, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a District Court of the United States for the District of Massachusetts, in a suit depending in said court between the United States of America, plaintiff, and John W. Dickinson and George M. Foster, defendants, judgment was rendered against the said John W. Dickinson, one of the said defendants, and the said John W. Dickinson having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the sixth day of September next.

Now, the condition of the above obligation is such, that if the said John W. Dickinson shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea
216 good, then the above obligation to be void; else to remain in full force and virtue.

JOHN W. DICKINSON. [SEAL.]
GEORGE H. SHAPLEY. [SEAL.]
WILLIAM O. TUTTLE. [SEAL.]
JOSEPH I. STEWART. [SEAL.]
ALEXANDER C. CHISHOLM. [SEAL.]

Approved:

FREDERIC DODGE,
Judge U. S. District Court.

Citation on writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the United States of America, greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the sixth day of September next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Massachusetts, wherein John W. Dickinson, one of the defendants in the cause of United States, plaintiff, v. George M. Foster and John W. Dickinson, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frederic Dodge, judge of the District Court of the United States for the District of Massachusetts, this tenth day of August, in the year of our Lord one thousand nine hundred and six.

FREDERIC DODGE,
U. S. District Judge.

ACKNOWLEDGMENT OF SERVICE.

AUGUST 10, 1906.

UNITED STATES OF AMERICA, DISTRICT OF MASSACHUSETTS, *ss:*

I hereby certify that on the tenth day of August, 1906, I accept service of the within citation and acknowledge due and legal service of the same.

JOHN H. CASEY,
Special Assistant United States Attorney.

217 District Court of the United States, District of Massachusetts.

UNITED STATES BY INDICTMENT
vs.
GEORGE M. FOSTER AND JOHN W. DICKINSON. } No. 180.

Order that writ of error operate as a supersedeas.

(August 10, 1906.)

DODGE, J: Whereas, lately, sentence has been pronounced against the said John W. Dickinson, one of the defendants under said indictment, and a writ of error procured by the said defendant Dickinson, and served on the attorney of the United States for this district, to reverse the judgment in this cause, and whereas a citation to the United States to be and appear at a United States Circuit Court of Appeals for the First Circuit, pursuant to said writ of error, has been issued.

It is ordered that the said writ of error operate as a stay of proceedings under said sentence, and that the execution thereof be superseded pending said writ of error.

By the Court:

FRANK H. MASON, *Clerk.*

District Court of the United States, District of Massachusetts.

UNITED STATES BY INDICTMENT
vs.
GEORGE M. FOSTER AND JOHN W. DICKINSON. } No. 180.

Order admitting defendant Dickinson to bail pending writ of error.

(August 10, 1906.)

DODGE, J: Whereas, lately, at the said District Court sentence was pronounced against the said defendant Dickinson, and the said defendant Dickinson having obtained a writ of error to remove

218 the said cause to the United States Circuit Court of Appeals for the First Circuit, to reverse the judgment therein, and a citation having been issued to the United States to be and appear at the said Circuit Court of Appeals pursuant to said writ of error, which citation has been served upon the attorney of the United States for said district.

It is ordered, that the said defendant Dickinson be admitted to bail pending said writ of error, and that he recognize with sufficient surety in the sum of fifteen thousand dollars.

By the Court:

FRANK H. MASON, *Clerk.*

Recognizance.

(Memorandum.)

UNITED STATES OF AMERICA, MASSACHUSETTS DISTRICT, *ss:*

At a District Court of the United States, begun and holden at Boston, within and for the District of Massachusetts, on the fourth Tuesday of June, in the year of our Lord one thousand nine hundred and six, to wit, August 10, 1906.

UNITED STATES BY INDICTMENT *vs.* GEORGE M. FOSTER AND JOHN W. DICKINSON.	In Case No. 180.

Personally appeared John W. Dickinson, of Boston, in said district, one of the defendants under said indictment, and Joseph I. Stewart and Alexander C. Chisholm, both of said Boston, and George H. Shapley and William O. Tuttle, both of Newton, and all in said district, and acknowledged themselves to be severally indebted unto the United States of America in the sums following, viz: the said John W. Dickinson as principal in the sum of fifteen thousand dollars, and the said Stewart, Chisholm, Shapley and Tuttle as sureties in the sum of fifteen thousand dollars, to be levied on their goods or chattels, lands or tenements, and in want thereof upon their bodies, to the use of the said United States, if default be made in the performance of the condition here following:

Whereas the said John W. Dickinson has this day been ordered to be admitted to bail pending the writ of error issued in this cause, returnable to the United States Circuit Court of Appeals for the First Circuit on the sixth day of September, 1906.

219 Now, the condition of this recognizance is such, that if the said John W. Dickinson shall personally appear before the District Court of the United States to be holden at Boston, within and for the district aforesaid, whenever required after the mandate

of the said Circuit Court of Appeals shall be received in this cause, to answer to such matters and things in the premises as shall be objected against him on behalf of the said United States, and more especially to such judgment as shall be awarded against him therein, and shall do and receive that which by this court shall be enjoined upon him in relation to the premises, and not depart without license, and shall meanwhile from term to term and day to day appear in this court whenever lawfully required in relation to the premises, then the above obligation to be void and of no effect, otherwise to abide in full force, power and virtue.

Attest: FRANK H. MASON, *Clerk.*

Clerk's certificate.

UNITED STATES OF AMERICA, MASSACHUSETTS DISTRICT, *ss:*

I, Frank H. Mason, clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing is a true copy of the record in the cause entitled,

THE UNITED STATES BY INDICTMENT
vs.
GEORGE M. FOSTER AND JOHN W. DICKINSON, } No. 180, Criminal Docket.

in said District Court determined, the petition for writ of error of the defendant Dickinson, the assignment of errors of said defendant, also a true copy of the bond to the United States on the writ of error issued on said petition, and also the original citation on writ of error issued in said cause, with the acknowledgment of service thereon; also true and attested copies of the order that writ of error operate as a super'deas, the order admitting defendant Dickinson to bail pending writ of error, and the recognizance of defendant Dickinson.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said district, this sixteenth day of October, A. D. 1906.

[SEAL.] FRANK H. MASON, *Clerk.*

220 *Order of enlargement of time for docketing cause and filing record.*

(September 4, 1906.)

For good cause shown, It is ordered that the time for docketing this cause and filing the record thereof with the clerk of the Circuit Court of Appeals be enlarged to and including Thursday, September 27, 1906.

FREDERIC DODGE,
United States District Judge.

Order of enlargement of time for docketing cause and filing record.

(September 25, 1906.)

For good cause shown, It is ordered that the time for docketing this cause and filing the record thereof with the clerk of the Circuit Court of Appeals be enlarged to and including Thursday, October 25, 1906.

FREDERIC DODGE,
United States District Judge.

United States of America, Circuit Court of Appeals for the First Circuit.

UNITED STATES *vs.* JOHN W. DICKINSON.

Stipulation as to printing record.

In the above-entitled case it is hereby agreed that in printing the record for the use of the Circuit Court of Appeals the following portions thereof may be omitted: The demurrer of the defendant Foster, filed March 23, 1901, the joinder to above demurrer of Foster, filed March 23, 1901, the additional demurrer of the defendant Foster, filed March 23, 1901, the bill of exceptions of the defendant Foster to the overruling of his demurrers, filed August 29, 1901, and the original bill of exceptions of the defendant Dickinson to the overruling of his demurrers, filed September 9, 1901.

ASA P. FRENCH,
United States Attorney.
POWERS & HALL,
Counsel for the Defendant Dickinson.

221 United States Circuit Court of Appeals for the First Circuit.
October term, 1907.

JOHN W. DICKINSON, DEFENDANT, PLAINTIFF IN ERROR,
vs.
UNITED STATES OF AMERICA, PLAINTIFF, DEFENDANT IN ERROR. } No. 681.

Error to the District Court of the United States for the District of Massachusetts.

Before Putnam, Aldrich and Brown, JJ.

Opinion of the court.

(February 12, 1908.)

PUTNAM, J.: This was a joint indictment of Dickinson and one Foster, the latter of whom was cashier of the South Danvers National Bank, under section 5209 of the Revised Statutes. Foster and Dickinson were convicted on several counts, but not on the fourth and

tenth. As Dickinson was entitled to do, he sued out this separate writ of error. The pith of the offence alleged against Dickinson was based on the fact that Foster, the cashier, was the principal offender, and that he, as such cashier, unlawfully "converted" certain "money, funds, credit and credits" to the use of Dickinson. The assets so converted were not otherwise described, except that, in each count, the value was given in one round sum. Neither was there any further description of the method of conversion. Dickinson was indicted as aiding and abetting. Consequently, Dickinson
222 could not be convicted under any count except as Foster was found guilty as principal.

The pith of the first error alleged is put in the following language:

"That each count of the indictment was vague and indefinite, and did not state with that reasonable certainty required by law the way in which the alleged misapplication was made."

We do not perceive that the general assertion that the various counts are vague is to be regarded by us except in that it is maintained that there is no description of the way in which the alleged misapplication was made. The plaintiff in error is misled by his own expression "alleged misapplication." If the word misapplication was all there was in the counts, they, of course, would be invalid in accordance with United States v. Britton, 107 U. S. 655, 669. There it was held that, in an indictment of this character, the words wilfully misapplied, without something to show the method of the misapplication, was insufficient. It did not need a decision of the Supreme Court to establish that proposition, because it represents a familiar rule in the criminal law. But, as we have said, it is alleged here that the assets were unlawfully converted to the use of Dickinson, so that the method of misapplication was shown. The word convert has such force at common law that, when used in an indictment, with a statement as to whose use the conversion was made, it needs no amplification, any more than the word embezzle, or the words steal, take and carry away. This we pointed out in Jewett v. United States, 100 Fed. Rep. 832, 837, decided by us on March 29, 1900.

The plaintiff in error relies on Batchelor v. United States, 156 U. S. 426, 427. That decision is not of much use as a precedent. The difficulty there was that there were long allegations of details, all connected by the words "in the manner following," and "in the manner aforesaid," and that the allegations taken as a whole the court could not understand. The only question was one of contradictory pleadings, arising from too much detail, rather than a lack of it as claimed by the plaintiff in error before us. It is quite likely that the pleadings in this case might have been criticised in some particulars not now urged, and that there might have been a variance shown at the trial. It is true that the word converted is,
223 also, awkward in the place where we find it here; but no objection was attempted on that ground, and its use as used here has

been accepted by the Supreme Court in a like connection and for the same purpose. Coffin v. United States, 156 U. S. 432, 435; 160 U. S. 666. The word convert, under the circumstances, must be accepted as intending exactly the same thing as when spoken in connection with the use of the person who was guilty of the conversion. So, also, the plaintiff in error has not relied on any variance, or any inadequacy of description of the assets which were misapplied, except with reference to the fourth and tenth counts, as to which he was acquitted. On the whole, the indictment, in the particular which we are now considering, is fully covered by our decision in Jewett v. United States, ubi supra.

As we have said, the plaintiff in error was charged with accepting the benefit of the misapplication of the assets of the bank by the cashier. This misapplication was by permitting overdrafts, and also by permitting the discount of various notes and the consequent drafts against the proceeds thereof, many of which notes ultimately involved the bank in serious loss. As the guilty intentions of Dickinson and Foster were involved, it would naturally be assumed that the United States would have sought to prove that they knew that some of these notes were worthless, or lacking sufficient assets behind them; but we are asked to consider objections to proof that Dickinson knew, or had reason to know, that such was the fact. The record shows that the court instructed the jury that the evidence of knowledge on the part of Dickinson would not affect Foster. The portion of the record thus referred to fails to observe whether the court charged that Dickinson's knowledge would not avail the United States unless the knowledge of Foster was also proven, as it should have done in some part of its charge. However, the following were the objections taken at the trial:

"The evidence in question had no sufficient legal bearing on the transactions complained of in the indictment or the issues properly involved in the trial thereof; the evidence was immaterial or remote; it was not sufficiently connected with the defendants; that it was not sufficiently connected with the transactions complained of in the indictment; it tended to complicate the issue, and to prejudice the jury."

224 These objections related to the testimony of numerous witnesses, in a sweeping form. We could have judged them more satisfactorily if exactly what occurred at the trial with reference to the particular evidence of any particular witness had been given us in a detailed, concrete form. The objection that the evidence had no sufficient legal bearing and was immaterial or remote, as a general proposition, certainly was not sound, because it was material to prove Dickinson's knowledge. That it tended to complicate the issue and prejudice the jury was, of course, ineffectual without explanation. All proofs may do those things. That it was not connected is not a proposition that we can consider on this record, where no statement

was made to that effect. The proof was material and admissible under an assurance that it would be connected. If it was not connected, the plaintiff in error had his remedy, but not in the way in which it is now sought to be presented. For example, the topic might not be legitimate if it had appeared that the court had, on the subsequent application of the plaintiff in error, refused to instruct the jury as to the proper method of connecting the proof, or as to its ineffectiveness if not connected with Foster. As the record stands, the admission of the evidence may, or may not, have been error, and it is impossible for us to determine which was the fact.

We are also asked to pass on certain correspondence between the Comptroller of the Currency and some of the witnesses which occurred subsequently to the misapplication charged in the indictment. Some of the directors who were parties to the letter to the Comptroller thus offered in evidence testified for the United States. It is not necessary to detail this correspondence. If it was offered to contradict, it was admitted at our bar that the ground therefor had not been laid for its admission; if it was offered to show merely the state of mind of the directors after the offence had been committed, it was clearly of no consequence; and, if it was offered to show ratification and approval, the directors could neither ratify nor approve as against the United States what was an already completed criminal act. The truth is that, so far as appears, the correspondence was merely ex post facto, and, under the circumstances, immaterial; and it was properly ruled out.

The only remaining point is that, by the consent of both the
225 United States and the plaintiff in error, the verdict was taken from ten jurors, two having been excused. The facts were as follows:

The full jury of twelve was empanelled and the trial commenced. While it was proceeding it appeared that one of the jurors, by reason of illness, was unable to sit further, whereupon the following agreement was filed of record:

"Whereas one of the jurors impanelled to try the above-entitled indictment is unable by reason of illness to further sit therein.

"Now, therefore, we consent and agree that the said juror, to wit, Charles F. Low, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining eleven jurors with the same force and effect as if said juror had not been discharged.

"JOHN W. DICKINSON.
"GEORGE M. FOSTER.
"UNITED STATES,
"By BOYD B. JONES,
"*Special Assistant U. S. Attorney.*"

The court proceeded with the trial with the remaining eleven jurors. Subsequently, the trial being still unfinished, death occurred in the family of one of them, and another like agreement was filed of record as to him. The trial proceeded with the remaining ten jurors, who returned a verdict, subsequently to which a motion in arrest of judgment was filed as follows, and overruled:

"And now, after verdict against the said John W. Dickinson, and before sentence, comes the said John W. Dickinson, by his attorneys, and moves the court here to arrest judgment herein and not pronounce the same, because of manifest errors in the record appearing, to wit: Because the said verdict against the said John W. Dickinson was found by a so-called jury consisting of ten (10) jurors only, and not by a jury of twelve (12) jurors, as required by the Constitution and laws of the United States, and because no judgment against him, the said John W. Dickinson, can be lawfully rendered on said verdict.

"POWERS & HALL,
"*Attorneys for the said Defendant.*"

It will be noticed that the trial commenced with the constitutional tribunal; that is, a court organized under the Constitution and laws of the United States, with authority to try the offence in ques-
226 tion, and a judge of that court duly appointed and commissioned, and authorized to preside at the trial, and a constitutional jury. The difficulty arose subsequently. We refer to these facts so that it may be understood that we do not overlook them, although neither party has made any distinction between a case where the full jury is first empanelled and jurors are subsequently withdrawn with consent of one, and where, with like consent, the jury was from the beginning deficient in numbers. We are not aware that any court or text writer has ever made any distinction on this score, and we will not attempt one. The following are the constitutional provisions in question:

The second section of Article III, of the Constitution reads:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crime shall have been commit'ed; but when not committed within any State, the trial shall be at such place or places as the Congress by law may have directed."

Amendment Article V reads:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a grand jury, except," etc.; and no one "shall be compelled in any case to be a witness against himself."

Amendment Article VI reads:

"[illegible] all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

Amendment Article VII reads:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

It is settled that the offence in question before us is an infamous crime within the meaning of the Amendment Article V, though not a felony. Ex parte Wilson, 114 U. S. 417. It has also been repeatedly determined by the Supreme Court that, even when the
227 phraseology of the Constitution is apparently unqualified, it may be construed with certain qualifications in the light of the principles of the common law, of which perhaps the most striking illustrations are Robertson v. Baldwin, 165 U. S. 275, and Capital Traction Company v. Hof, 174 U. S. 1. The latest is Williamson v. United States, 208 U. S. There is no question that it was settled law in England that, in a case of felony, the jury panel could not be weakened by waiver of the person prosecuted. Thompson v. Utah, 170 U. S. 343, 353, 354; Queenan v. Oklahoma, 190 U. S. 548, 551. But with regard to misdemeanors, we have made a very diligent search, and find no pronounced practice prior to the Constitution in the English courts or elsewhere with reference to like waivers.

It is no doubt true that, within the States of Maine, Massachusetts and New Hampshire, there has been to a certain extent practical recognition of the power in cases of misdemeanors to waive a full jury as the same was waived here; but apparently this was never formally approved until Commonwealth v. Dailey, 12 Cush. 80, decided in 1853. This practice, whatever it was, is not of such antiquity or universality as to affect the construction of the Constitution of the United States. In the absence of any historical guide, other State courts have arrayed themselves on different sides of the topic in numerous decisions, and under somewhat different constitutional forms of expression, and to some extent without recognizing any distinction between felonies and such high crimes as are misdemeanors. This has gone so far that it will be of no avail for us to do more than cite two or three of the leading authorities, and explain our conclusions as briefly as we

can. This is especially so in view of the fact that it is beyond our power to enter a judgment which involves finality, and it is also of little consequence what judicial results are reached until we have a determination of the Supreme Court directly on the issue, which determination we have never yet received.

It is plain that Amendments Articles V. and VI. are so expressed, and some of the elements to which they relate are of such a character, that there may be waiver to a certain extent by an alleged criminal, at least with regard to misdemeanors; as, for example, the privilege as to criminating testimony, the right to a speedy trial, the right to compulsory process for witnesses, the right to the assistance
228 of counsel for defence, and the right to be confronted by the witnesses. Others the accused cannot waive, as, for example, an indictment in the case of a capital or infamous crime, and a jury drawn from the district specified.

On the other hand, the provisions of section two of Article III. are peremptory in form, and point out absolutely the tribunal which must dispose of the crimes to which they refer. They cover nothing except what concerns the public interests, as well as personal liberty. The Article in unqualified terms establishes the tribunal. Inasmuch as the public, as well as the persons charged, have always an interest in what tribunal shall dispose of prosecutions for high crimes, it would appear prima facie that no prosecuting officer nor any person accused, whether acting separately or by agreement, can substitute another locality or another tribunal for that which the letter of the Constitution designates.

The tribunal pointed out by Article III. consists of a jury, and, by necessary implication, of a court established under the Constitution and the laws, with a judge or judges appointed also according to the Constitution and the laws to preside therein. We have said that there is no authoritative determination with reference to the topic before us; but the jury to be empanelled for a criminal cause within the meaning of the Constitution has been directly and authoritatively determined in Thompson v. Utah, 170 U. S. 343, to consist of twelve. With the aid of this determination, the third Article points out perfectly the elements of the tribunal authorized to proceed against persons accused of crimes like that before us, including equally the court, the judge and the jury, and the number composing the jury. Has anyone other than the makers of the Constitution, or those authorized to amend it, the power to substitute for what is thus declared? No one has ever conceived an affirmative answer as to the court or judge; and the apparent answer as to the jury would also be in the negative.

To be sure, while the Constitution and the Amendments make no literal distinction between a jury for criminal proceedings and a jury for civil proceedings, yet, with reference to bills of exceptions, writs of error, and everything else, the Supreme Court has accepted in civil proceedings verdicts of nine, ten or eleven jurors as verdicts of
229 constitutional juries; and the right of parties to waive the presence of one or more of the twelve in ordinary suits at com-

mon law is conceded. This, however, may be assigned to the fact that at common law the power to waive in civil suits was also conceded; and the authorities which we have cited establish the proposition that the Constitution and its Amendments are to be construed in the light of that fact. Again, it is urged, and it is true, that the hardships which may sometimes occur, arising from circumstances like those at bar, in the event of a constitutional inhibition of waiver, may be of the most serious character, sometimes even involving financial ruin of the accused in compelling him to abandon the first trial and go through a new one; yet, on the other hand, it is urged that it may well be presumed that a person charged with crime acts under duress, so that his consent to waive the advantages which may come to him from insisting on the unanimous concurrence of twelve jurors instead of ten or eleven ought not to be lightly accepted. Consequently, neither of these considerations presses with so much weight as to enable us to reach a determination of the question before us.

However, as we have said, we do not deem it of value to pursue the discussion throughout. We will put on the one side Chief Justice Shaw and the Supreme Judicial Court of Massachusetts as stating the right to waive, under circumstances as in the case at bar, in Commonwealth v. Dailey, 12 Cush. 80. On the other side, as sound a writer on Constitutional law as we have had, Chief Justice Cooley, declared as follows:

"The infirmity in case of trial by jury of less than twelve by consent would be that the tribunal would be one unknown to the law, created by mere voluntary act of the parties; and it would in effect be requiring to submit to a species of arbitration the question whether the accused has been guilty of an offence against the State." Cooley's Constitutional Limitations, 7th ed. (1903), 458, 459.

The learned jurist, in stating the direct proposition that a full panel could not be waived even by consent, adds: "at least in case of felony." But the principle he lays down covers every criminal proceeding where by the Constitution a common law jury is required. What we have attributed to him is quoted from the second edition of his Constitutional Limitations, but the same will be found in the edition of 1896, which is the last published during his lifetime.
230 Thus it appears that he reached the result stated at the end of thirty years' study and reflection. The reasoning which Chief Justice Cooley relied on as supporting the conclusion which we have attributed to him, is undoubtedly found in Hill v. The People, 16 Mich. 351, 357, decided in 1868. There the opinion was given by Judge Christiancy, and was concurred in by all the other judges, including Chief Justice Cooley. The doctrine spoken of by Judge Christiancy would sustain the judgment in this case. He proceeded as follows:

"The doctrine rests upon assent; in other words, when reduced to its final analysis, upon contract. Under our constitution, in civil

cases, there can be no reasonable doubt of the competency of parties to waive such an objection, or to stipulate for a trial by a jury of less than twelve, since they can waive the right of a jury trial altogether, and are held to have done so unless it is demanded. But a criminal prosecution, in which the people in their sovereign capacity prosecute for a crime against the laws of the whole society, and seek to subject the defendant to punishment, must, it seems to us, be considered as a proceeding in invitum, against the will of the defendant throughout, so far as relates to a question of this kind, or any question as to the legal constitution of the court or jury by which he is to be tried. It would be adding materially to the generally recognized force of the obligation of contracts to hold that a defendant charged with a crime might, without a trial, enter into a binding contract with the prosecuting attorney to go to the penitentiary for a certain number of years in satisfaction for the offense. And yet it would approximate such a position, to hold that he might be bound by a contract providing for a trial before a court or jury unknown to the constitution or the laws, the result of which trial might be to place him in the same penitentiary.

"The true theory, we think, is that the people, in their political or sovereign capacity, assume to provide by law the proper tribunals and modes of trial for offenses, without consulting the wishes of the defendant as such; and upon them, therefore, devolves the responsibility, not only of enacting such laws, but of carrying them into effect, by furnishing the tribunals, the panels of jurors, and other safeguards for his trial, in accordance with the constitution which secures his rights. The government, the officers of the law, bring the jurors into the box; he has no control over the matter, who shall be summoned or compose the panel, upon which he may exercise the right of challenge; and the prosecution must see that electors only are placed there, as the law requires." * * * "It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in
231 raising the objection. It is in such cases, emphatically, that consent should not be allowed to give jurisdiction."

The opinion of Chief Justice Shaw was based entirely on propositions initiated by himself, or by the court he represented. All the cases cited by him have been carefully examined, and they in no way meet the difficulty here; and he made no claim that they did. The conclusion he reached stood entirely on the force of his own reasoning, and he halts when he reaches the following, on page 83:

"But it is asked, if consent will authorize a trial before eleven jurors, why not before ten, or six, or one. It appears to us, that it is a good answer to say, that no departure from established forms of trial in criminal cases can take place without permission of the judge, and no discreet judge would permit any such extravagant or wide departure from these salutary forms as the question supposes, nor any departure, unless upon some unforeseen or urgent exigency."

We have been unable to answer satisfactorily the question which he thus asked himself to determine, or to frame any satisfactory rule by which, if the waivers at bar can be sustained, the jury may not be made to consist of one man instead of twelve. The legal mind involuntarily rejects a proposition that the jury might be so constituted constitutionally; and yet we are unable to determine at what point the weakening of the panel should stop unless it might by consent be reduced to a single individual. Chief Justice Shaw likewise finds no solution except the discretion of the judge; but, while, necessarily the discretion of the judge is often interposed in administering the civil law, and, to a certain extent, the criminal law, it seems wholly inappropriate that it should be availed of in a matter of so grave a character as the construction and practical application of the Constitution of the United States. We are not able to accept a proposition of that kind.

We have referred impliedly to the fact that the rule of the Supreme Court is that, ordinarily, the Federal courts in any district may follow the settled practice in criminal cases in the State which includes the district in existence at the time the Constitution was adopted. While this rule may not go so far as to control directly the construction of the Constitution, nevertheless, it can not be questioned that if, as shown historically, there had been, at the common law, or even in Massachusetts before the Constitution, a practice of
232 excusing jurors in misdemeanors, this would have weight under Robinson v. Baldwin, 165 U. S., 275; Capital Traction Company v. Hof, 174 U. S., 1, and Williamson v. United States, 208 U. S., already cited, as such ancient practices have with regard to waiving the disqualification of jurors, and even their impartiality, at least in trials for misdemeanors. For the traditional law of New England we look to Dane's Abridgement, where we are unable to find any trace of a practice supporting the proceedings now in review before us; and Chief Justice Shaw, who certainly would have known of such a practice if there had been any, in no degree rested Commonwealth v. Dailey on any assumption of that nature.

Of course, the fact to which we have referred is pressed on us, that the right to waive the disqualification of jurors, and even impartiality, is conceded, although the amendments guarantee an "impartial jury." This, however, is disposed of by the fact which we have explained, that the Constitution is construed in the light of the settled practice of the common law. At the common law it had always been held that such waivers, when permitted, did not constitute error. The precise distinction was made in Queenan v. Oklahoma, 190 U. S., 548, 551. There the matter was directly in issue on an indictment for murder, and, as the case came from a Territorial court, it involved the Constitution of the United States. It appeared that, in the course of the trial, the United States announced that, since an adjournment, it had been informed that one of the jurors had been convicted of an offence which, by the local law, was felony; and they gave full information in reference thereto.

The opinion observes that the Territorial court assumed that, for the then purposes, this disqualified the juror from serving; and it continues, as follows:

"The court asked the counsel for the prisoner what they desired to do, and its intimation indicated that, if the objection were pressed, the juror would be excused. This, of course, meant that the trial would have to be begun over again. The counsel for the prisoner answered that they had nothing to say, and the trial went on. It now is argued that the defendant was deprived of a constitutional right which he could not waive. Thompson v. Utah, 170 U. S., 343. The contrary plainly is the law, as well for the Territories as for the States."

233 This statement that, if the juror had been excused, the trial would have had to be begun over again makes an authoritative determination of a distinction, which applies as much to misdemeanors as to felonies, to the effect that it does not follow that because objections to the qualifications of jurors can be waived a reduction in their number can also be waived. Therefore, so far as this point is concerned, the United States can take no advantage.

Of course it would yield no results for us to attempt to go over to any substantial extent the history of trial by jury, which so many learned writers have undertaken to explain with more or less success. Therefore we will refer to only two evidences showing how rigid was the common law so far as applicable here. Lord Dacre's case was explained in Kelyng's Reports, 56. Kelyng showed the authority for his statements. He said it was ruled unanimously by the judges who had been summoned into the House of Lords that Lord Dacre could not waive his trial by his peers and be tried by the country, and also that, although all the peers did not agree in their verdict, it would still be a good verdict, "so that there be twelve or more." He added: "Therefore the use is never to have less than twenty-three peers for Tryers, because that is the least number to be sure that twelve be of one mind." So in Forsyth's History of Trial by Jury, 241, it is stated that it was decided in the reign of Edward the Third that "a verdict by less than twelve" was a nullity. Authorities for this are cited. Lord Dacre's case was, of course, a felony, and perhaps neither of the citations are directly in point here, but they show that the common law sought to secure not merely a jury of twelve, but the concurrence of that number. Reasons for this of a very special character have been often suggested.

We fully appreciate the urgent arguments to the contrary of our propositions; but in view of the insufficient status of judicial decisions we do not feel that we are permitted to qualify the situation. Of course this conclusion has no relation to minor offences of the class covered by Schick v. United States, 195 U. S., 65, but it applies to high misdemeanors of the character at bar.

The United States press on us that the amendments Articles V and VI modify, on the questions we are considering, Article
234 III of the Constitution as originally adopted. We find no authority in support of this proposition. The amendments, as we have said, touch some matters which, by their very nature, are of such a character that a person accused may waive them. They also include other matters which, by their very nature, can not be waived, as, for example, the requirement of an investigation by a grand jury with regard to infamous crimes seems to be settled in Callan v. Wilson, 127 U. S., 540. This requirement, like those of Article III directing a jury and fixing the place of trial, relates to the frame of government, and therefore it is not subject to the control of the parties. The only expressions we find in the decisions of the Supreme Court relating to this subtopic are in Schick v. United States, 195 U. S., 65, 68, and in Callan v. Wilson, at page 549. Schick v. United States determines nothing, because it merely says that "if there be any conflict" between the amendments to the Constitution as originally adopted, "the amendments must control" under the well understood rule that "the last expression of the will of the lawmaker prevails." On the other hand, the opinion in Callan v. Wilson states definitively that "there is no necessary conflict."

The observations in the opinions of the Supreme Court seem to be in complete harmony with the generally accepted rule, to the effect that, while the original Constitution relates to the frame of government, the amendments are in the nature of a "bill of rights," which, of course, is understood to be in the interest of the citizen or subject, and therefore prima facie more or less under his control and subject to waiver. The amendments are described in the first edition of Story's Commentaries on the Constitution, § 1776, and in the third edition of the same work at §§ 303 and 1857, and in Cooley's Constitutional Limitations, 7th ed., at page 365, as a "bill of rights." Story points out that the Constitution was not supposed to contain any bill of rights, and that no objection to it was proclaimed with more zeal and pressed with more effect than the want thereof. The Growth of the Constitution, by Meigs (1900), which, so far as we have examined it, appears to be correctly stated and which is a convenient handbook with reference to the work of the constitutional convention, points out, at pages 250 and 314, that the Constitution
235 as originally adopted contained no bill of rights, and that the convention being divided on the question all attempts to frame one were dropped. Indeed we might dispose of this entire subtopic by reference to the opinion in Robertson v. Baldwin, 165 U. S., already referred to, according to what appears therein at page 281, as follows:

"The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not

intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case."

So far, therefore, from this proposition on the part of the United States impressing us, it indicates why it is that the constitution of a jury in criminal cases as to numbers as known to the common law is a matter of governmental regulation, while several things which are secured by the amendments, and which may be waived by an accused person, are of a different character. It also assists in explaining the fact that, in accordance with the rules of the common law, some things may be waived, as, for example, the qualification of a particular juror or the right to a speedy trial, while it does not follow that, by analogy, a waiver may extend to any part of the provisions of Article III of the original Constitution applicable hereto.

The judgment of the District Court and the verdict therein are set aside, and the case is remanded to that court for further proceedings in accordance with law.

Dissenting opinion.

ALDRICH, J: I concur in the majority opinion except that part which declares the trial invalid because the verdict was by ten jurors rather than twelve. The trial was constitutionally organized and had progressed at great length, in strict conformity with law, when a juror was discharged by order of court, by reason of sickness, and, near the close of a three months' trial, another juror was discharged by reason of death in the juror's family. This action was taken
236 by the court, in both instances, upon full consent and agreement in writing of the accused and the proper representative of the Government, and upon the further agreement that the trial should proceed with the same force and effect as if the jurors had not been discharged; and the trial was concluded with the remaining ten jurors under the discretionary approval and order of court.

The doctrine of waiver, as applied to a trial which would be otherwise irregular, is of course not to be narrowly accepted as making an unconstitutional trial valid by contract, but is grounded more upon the idea that the agreement, consent, and conduct of the accused, with respect to a question not affecting the jurisdiction of the court, whereby he induces the court to go forward, and whereby he secures the chance of getting an acquittal, operate as a waiver of the right to raise the objection, in the event of an unfavorable result, that the course adopted was irregular.

The offence charged was statutory, the statute creating it declaring it to be a misdemeanor (section 5209), and the majority opinion seemingly concedes, what is true, that the books do not show any

rule or practice in the English courts, prior to our Constitution, that a jury of twelve may not be weakened, in misdemeanor cases, upon waiver by the accused.

Our constitutional provision as to jury trial means the jury trial as used and practised in England at the time of the adoption of the Constitution; and, under English history and authority, there is apparently no warrant whatever for the theory that, as jury trial was used and practised in misdemeanor cases in England, an accused might not waive his right to object to irregularity due to the fact that his jury trial, once properly organized, had subsequently sustained a fractional loss.

While our Constitution does not expressly declare that a panel shall consist of twelve jurors, I do not take issue with the proposition that the common law number of twelve is required at the outset in cases of felony, or with the proposition that, in the higher grades of misdemeanors, trials should begin with that number.

Article 3, section 2, of the Constitution, which declares that the trial of all crimes, except impeachment, shall be by jury, and the sixth amendment, which provides that the accused shall enjoy
237 the right to a speedy and public trial by an impartial jury, were, in a very large sense, if not altogether, something established for the benefit and protection of accused parties; and there is great force in the position of the Government, that a trial by a jury of twelve is a guaranty or a privilege which cannot be withheld from a person accused, but is one which he may waive.

This position is especially strong in a case like this where the constitutional common law jury was vouchsafed to the accused, and where, in the course of a long trial, sickness and death made it certain that the fruits of the trial must be lost, or its benefits saved to the accused and the Government by consent to proceed with a less number than twelve.

As recently said by Mr. Justice Holmes, in Interstate Consolidated Street Railway Company v. Commonwealth of Massachusetts (207 U. S., 79), constitutional rights, like others, are matters of degree, and constitutional provisions are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses.

The aim of the constitutional safeguards in question is a full, fair, and public trial, and one which shall reasonably and in all substantial ways safeguard the interests of the State and the life and liberty of accused parties. Whether the idea is expressed in words or not, as is done in some of the bills of rights and constitutions, a free and fair trial only means a trial as free and fair as the lot of humanity will admit.

All will doubtless agree, at least the unquestioned authority is that way, that these protective provisions of the Constitution are not so imperative that an accused shall be tried by jury when he desires to plead guilty; or that his trial, in the event of trial, shall be held invalid for want of due process of law, based upon the ground that

he was not confronted with his witnesses when he had waived that constitutional right and consented to the use of depositions; or because he had not had compulsory process for obtaining witnesses in his favor when he had waived that; or because he had not had the assistance of counsel when he had intelligently refused such constitutional privilege and insisted upon the right to go to trial without counsel; or upon the ground that he had not had a speedy trial
238 when he had petitioned the court for delay; or that his trial was not public when he had consented to, or silently acquiesced in, a trial in a court house with a capacity of holding only twelve members of the public rather than twelve hundred.

Beyond question, the right of an accused in a case like this to have twelve jurors throughout is so far absolute as a constitutional right that he may have it by claiming it, or even by withholding consent to proceed without that number, and doubtless, under a constitutional government like ours, the interests of the community so far enter into any incidental departure from that number, in the course of the trial, as to require the discretionary approval of the court, and that the proper representative of the Government should join the accused in consent.

I quite agree with the majority opinion as to the constitutional and practical importance of the question under discussion.

In the lot of humanity men fall sick and die, and if the constitutional safeguard is so hard and fast that an accused, who has been subjected to a constitutional trial for three months, cannot waive a fractional part of the right which he has enjoyed in order to save his substantial right and get a result, but must be subjected to the burdens of another trial with perhaps the same dilemma, it will become an instrument of oppression rather than one of protection, and thus the preventive would become something worse than the apprehended danger.

I do not agree that the historical jury of England, in respect to the number of twelve, or in respect to waiver, as the right of jury has been administered in English proceedings, is quite as hard and fast as the majority opinion assumes, and I incline to the belief that the English jurist of to-day would be greatly surprised to learn that a jury trial in a misdemeanor case is constitutionally and historically invalid because a juror had been removed from the panel by reason of sickness or death, occurring in the course of the trial, and where the defendant freely and intelligently exercised his right of waiver, and where the Crown and the accused, under the discretionary approval of the court, waived all objections and formally consented in writing that the trial should proceed, and where such a course was adopted as something in the just administration of the
239 law in respect to the rights of the defendant and the rights of the Government as well.

The case to which Forsyth refers, at page 241, in his History of Trial by Jury (41 Assis. 11), as having decided in the reign of Edward the Third, that a verdict by less than twelve was a nullity,

and upon which reliance is placed by the majority opinion, has not the remotest application here, because in that case the jury failed to agree, and without consent a verdict of eleven was taken notwithstanding the disagreement. Consequently, neither the element of consent nor of waiver was present. That the rule is different with respect to verdicts upon consent is shown by a note to the English text, which explains that "at the present day a verdict by less than twelve is sometimes taken by consent of both parties."

It is, indeed, strange that so little is found in the English textbooks and cases upon questions arising in the course of trials for misdemeanors in respect to eliminations from the English jury of twelve, originally constituted in strict compliance with the formalities and requirements of law.

It is, perhaps, unnecessary to inquire whether dearth of English reasoning upon such situations is explainable upon the ground that the right of waiver, under circumstances of misdemeanors, is so plain and palpable under the maxim, "Quilibet potest renunciare juri pro se introducto," that it has gone without extended discussion. (Broom *699)

The case of The Queen v. Sullivan (8 A. & E. 831; 1 P. & D. 96) would seem to give support to the theory that in England the right of waiver under circumstances of misdemeanor would be accepted as of course. In that case, which was one of conspiracy, and as such, an offence of a higher grade, a juror, after the trial had been opened, arose and stated that he was on the grand jury that presented the bill. The prosecution offered to consent to his withdrawal; but, the defendants not consenting, and, according to the report of the case in Perry & Davidson, objecting to his withdrawal, the trial proceeded. After verdict the defendants moved for a new trial upon the ground that the case had been mistried. The point was taken that the verdict was only by eleven, and that "so tender is the law of England of the lives of the subjects, that no man can be convicted at the
240 suit of the king of any capital offence unless by the unanimous voice of twenty-four of his equals and neighbors; that is, by twelve, at least, of the grand jury, in the first place, assenting to the accusation, and afterwards by the whole petit jury, of twelve more, finding him guilty upon his trial," and that the books did not warrant a limitation of this rule to juries sitting on capital cases. But Lord Denman disposed of the point against the defendants, without discussion, upon the ground of waiver.

In King v. Sutton (8 B. & C. 417) one juror was an alien, and the point was taken that the decision of the jury was therefore void. Rule was refused by Lord Tenterden with very little discussion, but with the suggestion, if a new trial were granted under such circumstances at the instance of a defendant, that it would also have to be done at the instance of a prosecutor.

I will pass from the English cases involving crimes less than capital with the thought (1) that a rule that the Government would not be held to have waived the constitutional point under such circum-

stances in cases of misdemeanor, and which would, as a result, subject the accused to a second trial, would be intolerably oppressive to him, and (2) if the fundamental rights of an accused in respect to the original constitution of the jury may be held to be waived by his conduct or silence there is no apparent sufficient reason why an accused may not voluntarily waive rights, in respect to incidents of his trial, by free, independent and intelligent consent and agreement in writing, under the protecting advice of counsel, through which the substance of his intended constitutional trial is saved to him.

Now, as to analogous situations of great weight upon the question under discussion, because they involve waiver of English fundamental rights of a higher grade than those involved in misdemeanors.

The great privilege secured to English subjects by the common law, that no person shall twice be put in jeopardy of life and limb for the same offence, while not always treated in the books as fundamental because it relates to practice and to the just course of criminal procedure rather than to an original right, is far more essential and of vastly greater importance as a practical safeguard to life and liberty than the right which gives the accused twelve jurors, rather than eleven, throughout the trial, if he wants them.

241 Under our Constitution the fundamental right of the accused is to have the jury of twelve. That having been furnished to him, whether it shall remain intact throughout the trial is something in the nature of an incident of the right, and if some fractional or relatively small loss is unavoidably sustained in the course of the trial it is a loss which is as much the loss of the accused as the loss of the Government, such is "the lot of humanity." The question of waiving the fractional or incidental loss under such circumstances, therefore, stands upon a different footing than would a question as to the right of an accused to waive the fundamental or original right altogether.

In Kinloch's case (Fost. C. L. 16–36), after the trial had opened the jury was discharged at the request of the defendant in order that he might raise certain questions upon demurrer, and, after the demurrer was disposed of, the question was whether putting him upon a second trial would be against the rule in respect to twice in jeopardy. The question, as stated at page 31, was whether, in a capital case, the court may not discharge the jury upon motion of the prisoner's counsel and at his own request and with the consent of the attorney-general before evidence given, in order to let the prisoner put in a defence which, in the opinion of the court, he could not otherwise have been let into.

Kinloch's case was carefully considered upon the theory (page 38) that discharging the jury was not a strain in favor of prerogative; that it was not done to the prejudice of the prisoners, but, on the contrary, was intended as a favor to them. Enlarging upon this theory it was said: "In that light, I say, it was considered by the court; in that light it was considered by the prisoners and their counsel, and accordingly they prayed it; and in that light Mr.

Attorney-General, with his usual candor, assented to it, and in that light I know of no objection in point of law or reason to it, and therefore I am of opinion that judgment ought not to be arrested." Thus the course which the first trial took was held not to operate as a discharge of the prisoners from a future trial for the same offence.

While the decision was not expressly based upon waiver, it was in fact based upon the principles of waiver, because, as reasoned, the prisoner, being relieved from the first trial upon his own con-
242 sent and request and for a supposed benefit, should not be permitted to interpose the first jeopardy as a bar to a future trial.

Under an ancient and fundamental rule of law an accessory could not be legally indicted and convicted as accessory until the principal had been convicted, yet, according to Lord Coke, applying the maxim, "Quilibet potest renunciare juri pro se introducto," he might waive that right and go to trial before the principal was attainted. 2 Inst., chap. 14, page 183.

It would seem, according to Sir John Kelyng's report of the Lord Dacre case, that it was more a question there whether Lord Dacre could, in his own right, select a tribunal other than that of his peers than a question of waiver; at least, the effect of the reasoning of Rex v. Knowles (12 St. Tr. 1167, 1196) is that it is not the right of a peer to select his tribunal, because of the king's right and interest in the dignity and official titles of nobility.

The rule that a peer cannot in his own right renounce his privilege of being tried by his peers, and thereby select another kind of a tribunal, is doubtless based upon political and State considerations, and upon the idea that his title is not personal but an honor of inheritance, and that conviction of treason, which was the charge in Lord Dacre's case, would work corruption of blood and a forfeiture of title. It is true enough that, if a peer were put upon trial for treason before a jury, he might in his own right arbitrarily insist upon a trial before his peers. The converse, however, is not true. Where a peer is put upon the Magna Charta trial before peers, he can no more in his own right waive that trial and take a jury trial than could a judge or a President under impeachment waive the constitutional trial before our Senate and elect a trial by jury. Such a question of waiver was the one considered in the Dacre case, and it sustains no analogy whatever to the kind of waiver before us.

It is manifest that the principle involved in Lord Dacre's case in no way touches the question here, because, under the law of England, as will be seen, if the peer consents to have, and is given, a different kind of a trial than the one before his peers, he has by his conduct waived the right to object that the trial he has had is not the one he was entitled to under fundamental law. It thus follows
243 that a peer who has voluntarily elected to take the chances of a trial by a jury of commoners will not thereafter be permitted to have a second trial by his peers, upon the ground that he could not waive, and has not had, the trial contemplated and vouchsafed by Magna Charta.

"It is as much the law of the land, that a peer be tried by his peers as a commoner by commoners. Yet if one who has a title to peerage, be indicted and arraigned as a commoner, and plead not guilty, and put himself upon his country, it hath been adjudged, that he cannot afterward suggest that he is a peer, and pray a trial by his peers." (4 Hawk. P. C., chap. 44, sect. 19.) Thus, under the doctrine of waiver, a peer loses his Magna Charta right of trial by his peers, which is at least as fundamental as the right of an accused in a misdemeanor case to have the exact number of twelve throughout his trial.

In respect to safeguards, distinction was made at an early time in England between the graver cases and cases of misdemeanors, and while the plea of guilty was discouraged in capital cases, it was received without hesitancy in other cases of felony and in misdemeanors, and while the trial of noblemen was by their peers in treason and felony, in misdemeanors, even of the higher grades, as libels, riots, perjury and conspiracy, they were triable by a jury like a commoner. (1 Christian's Blackst., 12th ed. 401, note 7; 4 id. 349, note 2; 3 Inst. 30; 4 Sharswood's Blackst. 259 and notes.)

Under our law there is no express constitutional mandate that the jury shall consist of twelve, though, without doubt, the right of the common law number, as the right was administered in England, was intended; there is no constitutional mandate that waiver shall not be made in proper cases, and, while considerations of public policy are against waiver in capital cases, such considerations are by no means absolute and controlling in respect to prosecutions for misdemeanors.

Without discussing the question whether there is any precise line of distinction upon exact legal principles between the higher and the lower grades of crimes in respect to waiver, there are unquestioned and cogent reasons of public policy requiring the rule of strict construction which renders waiver inadmissible in capital cases
244 that do not exist in any broad and substantial sense in prosecutions for the lower grades of offences, although the same considerations of public policy doubtless, in a measure, but in a less conclusive sense, enter into the original constitution of the jury in other felonies and the higher grades of misdemeanors. When, in prosecutions for the lower crimes, a loss, not expressly covered by constitutional mandate, comes to a constitutional jury trial in progress, the question whether waiver is admissible, in a given situation, is apparently not to be determined upon an abstract legal line drawn between felonies and misdemeanors, or between different kinds of felonies, or different kinds of misdemeanors, but upon sound discretion exercised with reference to the character and extent of the loss—whether the loss is so slight and fractional, and so far incidental, that its waiver would not offend public policy, or so vital and comprehensive as to dethrone the substance of the constitutional plan, thus presenting a situation which invokes the interposition of considerations of public policy against its waiver.

Whenever the progress of a constitutional jury trial is interrupted by a fractional and accidental loss from the panel, the practical question presented to the trial court always is, whether the accused shall be allowed to waive the loss and enjoy the substance of his constitutional right and have the jury trial he wants, or whether public considerations are so strongly against it that waiver shall be denied to the end that he shall not enjoy the substance of his constitutional right and have the jury trial he wants.

There is no decision of the Supreme Court upon the precise point under consideration and, while state decisions are numerous and involve diversity and conflict upon questions somewhat akin, though quite collateral in principle, there is very little discussion to be found in American text-books, or by state courts, upon the particular question with which we are dealing. The discussion along these lines is largely confined to questions of waiver in the course of trials in capital and other felony cases; to the right of waiver of the whole jury in cases involving misdemeanors; and to questions of right and of public policy as viewed in respect to questions raised against the jury tribunal as originally constituted; as, for instance, starting with a jury of less than twelve, with jurors illegally drawn, with jurors absolutely disqualified, with jurors not sworn, and the like.

Commonwealth v. Dailey (12 Cush., 80) is an authority in point in that one of the jurors was withdrawn, during the progress of the trial, from a panel properly constituted at the outset. This authority has not been followed in some jurisdictions where it was sought to apply it in cases where the precise point which it covers was not involved. It will be found where it has been questioned by the courts in other jurisdictions and by text-writers that the doubt was evidently based upon the mistaken theory or supposition of a scope broader than the precise point decided, and as involving something beyond what was intended by the justly renowned jurist who pronounced the decision.

The doctrine of Commonwealth v. Dailey is not easily overturned or shaken. The decision was rendered in 1853, by a judge who, by common consent, stood next to Marshall as an American jurist, upon full consideration and careful reasoning, and upon self-imposed limitations, founded upon considerations of public policy, which renders it applicable only to cases of misdemeanors in which the jury, as originally constituted, consisted of twelve men, and for more than fifty years it has been generally accepted and followed, throughout the country, in the practical administration of criminal justice, in respect to incidents of misdemeanor trials in actual progress.

It is unmistakable that Chief Justice Shaw had in mind the very important distinction between cases starting with less than twelve and cases where there is a loss from that number upon trial. In the one instance there is some reason for treating the number as a fundamental essential, and there is no necessity for starting with less

than twelve, because the State has ample and ready means at hand for constituting a jury of that number, and nothing substantial is lost to the accused or the State by the slight necessary delay in doing it; while, in the other instance, the jurisdictional essential having been supplied, all the time, expense and advantages, which attach to a properly constituted trial in progress, both as regards the rights of the accused and the interests of the State, are altogether lost, unless the accused party's constitutional right of jury is subject
246 to waiver as to some possible fractional losses incident to contingencies and necessities resulting from sickness and death.

Moreover, the principle of Commonwealth v. Dailey was expressly recognized by the Supreme Court in Schick v. United States (195 U. S., 65), where, after saying, "When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy," and that "authorities in the State courts are in harmony with this thought," the opinion quotes approvingly the expression of Chief Justice Shaw, that "he may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court," and cites various State authorities sustaining the principle involved.

It would seem that Schick v. United States goes further in recognition of the right of waiver than Commonwealth v. Dailey, because it sustains the right of waiver of the entire panel in cases of misdemeanor.

It may, perhaps, be urged that the case at bar involves a graver misdemeanor than that in Schick v. United States; but does this furnish a sufficient reason for a distinction?

There is no constitutional or statutory mandate which draws a line in this respect between misdemeanors. Are there any considerations of public policy which interpose in one class of misdemeanors while not in another, and, if so, where is the line of cleavage to be drawn?

It is not important to inquire whether with us there is any offence answering strictly to the English felony, or whether there is any logical and general line of distinction between felonies and the higher misdemeanors, because not only was the offence, in the case at bar, created by statute, and declared to be a misdemeanor by the statute which created it, but it is, in its character, peculiarly one of misdemeanor, as it relates to demeanor and misconduct "in the business of one's office."

It may also be urged that the penalty prescribed for the offence charged in the case at bar, that of imprisonment, raises considerations of public policy not present in Schick v. United States. But is this a sufficient answer? Inability or failure to pay the fine prescribed in the oleomargarine case would result in imprisonment, and
247 therefore the consequences of the danger supposed to lurk in a rule which would permit an accused to waive away his liberty are present in such a situation as much as in the other.

It is probable that the history and debates of the Constitutional Convention will not be found to sustain the idea that the constitu-

tional safeguards in question were in any sense established as something necessary to protect the state or the community from the supposed danger that accused parties would waive away the interest which the Government has in their liberties, and go to jail.

There is not now, and never was, any practical danger of that. Such a theory, at least in its application to modern American conditions, is based more upon useless fiction than upon reason. And when the idea of giving countenance to the right of waiver, as something necessary to a reasonable protection of the rights and liberties of accused, and as something intended to be practical and useful in the administration of the rights of the parties, has been characterized as involving innovation "highly dangerous," it would, as said by Judge Seevers in State v. Kaufman (51 Ia. 578, 581), "have been much more convincing and satisfactory if we had been informed why it would be highly dangerous."

So far as practical consequences to the liberties of accused parties are concerned, a hard and fast rule of law which denies the right of an accused to waive the loss of a juror, stricken from the panel by sickness or death, during the progress of the trial, would be far more dangerous and intolerable than would a rule which accords to an accused, upon written application, joined by the Government, and under the approval of the court, the right to waive the fractional loss whereby he may establish his right to liberty and save to himself the expense, the delay and the oppressive imprisonment incident to another trial.

Traced to its English origin, it would probably be found, so far as the right of waiver was there withheld from accused parties, that in a very large sense the reason for it was that conviction of crime, under the old English system, operated to outlaw and to attaint the blood and to work a forfeiture of official titles of inheritance, thus affecting the rights of third parties.

In every substantial sense our constitutional provisions in
248 respect to jury trials in criminal cases are for the protection of the interests of the accused, and as such they may, in a limited and guarded measure, be waived by the party sought to be benefited.

The constitutional provision as to a jury is not so absolute as a Government regulation, nor is the idea of a jury of twelve so apostolic as not to safely permit of a little relaxation, in a proper case, at the request, or upon the prayer, of the party most interested, to the end that he may have a speedy and practical administration of justice in accordance with the spirit and substance of the constitutional plan.

An order of court permitting a trial in progress to be concluded upon request and consent of an accused is always intended as something for his benefit and reasonable protection; and, while the right

of twelve jurors to the end of the trial would never be denied an accused if he claimed it, and, while a cause would never proceed without the number of twelve, except upon consent of the accused, withholding from him the right of waiver, under the idea of supposed danger to his liberty, when he wants to exercise the right in order to save the trial and get his liberty, would be something more in the nature of an act of oppression than of an act for his reasonable protection and security. And, when discretionary action is taken by the court, upon the request of an accused under advice of counsel, approved by the proper representative of the Government, which preserves the substance of the constitutional tribunal, and which permits his trial to go on for his benefit and to the end that he may take the chance of securing an acquittal, he should not be permitted to set up the invalidity or irregularity of such a course; and this is so upon reasonable grounds of general good faith as well as upon principles of waiver and estoppel. That, doubtless, is the English view in respect to the application of such principles to analogous situations, involving weightier consequences in cases of felonies; and there is no sufficient reason why it should not hold good here in misdemeanor cases.

The case of Edwards v. State (16 Vroom (N. J.) 419) deals with constitutional provisions with respect to jury trials, and, upon careful consideration, accepts them as safeguarding rights and privileges established for the benefit of accused parties and as something
249 which cannot be withheld but which may be waived; and the Supreme Court of New Hampshire, in the concluding paragraphs of the opinion of the justices (41 N. H. 550, 552), without discussion or question, deals with the constitutional guaranty as involving a right which may be waived. See also State v. Almy, 67 N. H. 274, 280.

Upon the exact point decided in Commonwealth v. Dailey there is apparently no conflict of authority; and it is quite sufficient for present purposes to say that, so far as known, there is no case, not of felony, in any jurisdiction, involving the precise question of the case at bar, which holds that an accused may not waive the loss of a single juror in the progress of his trial, from a panel originally constituted according to the forms of law, and the case of State v. Kaufman (51 Ia. 578) extends the doctrine because that was a case of forgery, and though one juror was discharged and the trial resumed with eleven, upon consent, the situation was accepted as not raising questions relating to the jurisdiction of the court, and it was held that the loss of a juror was something which might be waived by the accused. See also State v. Grossheim, 79 Ia. 75.

To the same effect in misdemeanor cases are State v. Mansfield, 41 Mo. 470; State v. Sackett, 39 Minn. 69, 72; United States v. Shaw, 59 Fed. Rep. 110, 114.

If the disqualification of a juror appears in the course of a murder trial, and the accused fails to object, he waives his objection, and a

trial by eleven qualified jurors and one disqualified juror does not deprive him of a constitutional right which he may not waive. (Queenan v. Oklahoma, 190 U. S. 548, 551.)

I do not look upon Queenan v. Oklahoma as meaning what the majority opinion claims for it. The question of waiver was in no sense rested upon the idea of twelve jurors, but upon the failure of the accused to press an objection which would have been fatal to the trial. It is unmistakable that this case recognized the idea of a proper application of the doctrine of waiver to matters of substance, as well as of form, in trials for the higher crimes. That case and the one at bar, under extreme logic, are not technically the same, in respect to the nature of the loss to the right of the accused; but it seems clear that the principle which renders the doctrine of waiver admissible in a case where the accused remains silent, and his
250 trial for murder is concluded after he knows that one of his constitutional twelve is totally disqualified, would safely enough render it admissible in a trial for misdemeanor constitutionally begun, and concluded upon the express request of the accused after he knew that a juror had been discharged with his assent during the course of his trial. But, without regard to whether the two cases are precisely alike in principle, the plain meaning of the Oklahoma case is that the accused lost a substantial right through waiver. This is so because the tribunal was made up of eleven qualified jurors and one disqualified juror, who could not have been counted as a part of the constitutional twelve in the absence of the silent consent of the accused, and because the loss to his constitutional privilege of having twelve qualified jurors was so vital that the mere exercise of his right to object would have been fatal to the trial, yet by remaining silent he waived the right to object, and consequently the fractional loss which he had sustained. In short, he waived his right to have a full jury of twelve qualified men.

The authorities are numerous which go far beyond Commonwealth v. Dailey, and hold that an accused may waive a jury trial altogether in misdemeanor cases. Schick v. United States, 195 U. S. 65; Darst v. People, 51 Ill. 286; Logan v. State, 86 Ga. 266; State v. Woodling, 53 Minn. 142; Ward v. People, 30 Mich. *116; Commonwealth v. Sweet (Quart. Sess.), 16 Pa. Co. Ct. R. 198; Id., 4 Pa. Dist. R. 136; State v. Alderton, 50 W. Va. 101; Morris v. State, 4 Baxter (Tenn.), 289, 292.

There are other cases holding that he may waive and go to trial with less than twelve in misdemeanor cases. State v. Van Matre, 49 Mo. 268; Murphy v. Commonwealth, 1 Met. (Ky.) 365; Tyra v. Commonwealth, 2 id. 1; State v. Borowsky, 11 Nev. 119; State v. Cox, 8 Ark. 436; State v. Mansfield, 41 Mo. 470, 479.

Upon the extreme proposition that an accused, in cases involving certain grades of felony, may waive his constitutional right and go to trial with less than twelve, as well as upon the less extreme propo-

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sition that he may waive the loss of a juror from a properly constituted tribunal, during the course of a felony trial, there is conflict, involving a field of discussion which we need not enter because it is foreign to the question under consideration.

251 It is quite clear, from a careful reading of Commonwealth v. Dailey (supra), that Chief Justice Shaw had in mind a distinction between a case started with a deficient number of jurors upon consent and a case where a juror was withdrawn upon consent during the course of a trial.

It is likewise clearly manifest that Judge Cooley (Const. Lim. 7th ed. 458, 459), in presenting a view in the nature of a query and in speaking of the infirmity of a trial by a jury of less than twelve by consent as involving a trial in the nature of an arbitration, was directing his thought to the tribunal as organized at its inception, and even this view has the very significant qualification, "at least in case of felony."

So in Hill v. People (16 Mich. 351), which was a case of murder, the question related to the original organization of the jury and to a defect which the accused did not know.

The question in Thompson v. Utah (170 U. S. 343) related not only to the proper organization of the trial at the outset, but to a substantial departure from the constitutional plan, in that the trial started with a jury of eight; and the case, moreover, involved a statute which was ex post facto in its application to the offence charged.

Likewise Chitty's Criminal Law, 505, refers to a petit jury when sworn rather than to an incidental loss in the progress of a trial.

The same is true of the irregularity in Hopt v. Utah (110 U. S. 574), which raised the question whether the jury was originally organized according to the requirements of the Constitution; and the case in no way involved a consideration of express waiver as applied to an incident of a trial, or of any question as to the binding effect of waiver in respect to a fractional loss from a constitutionally organized tribunal during the course of a trial.

Not speaking now of questions of good or bad faith to courts charged with the administration of justice, or of general public considerations, a construction of the constitutional provision—establishing the right of trial by jury as something for the general benefit of society, but for the special benefit of those accused of crime—which would compel, or permit, the Government to stop and send an accused to another trial, and perhaps to repeated trials, in a misdemeanor case, through a denial of the right, when he wants to exercise

252 it, to waive a fractional loss from a constitutional trial once entered upon, would often render the provision an instrument of oppression and, as a result, in many instances, "trial by jury itself, instead of being a security to persons who are accused, will be a delusion, a mockery, and a snare."

253 Order of Court staying mandate.

United States Circuit Court of Appeals for the First Circuit. October Term, 1907.

JOHN W. DICKINSON, DEFENDANT, plaintiff in error, *vs.* UNITED STATES OF AMERICA, PLAINTIFF, defendant in error.	No. 681.

Final judgment in Circuit Court of Appeals.

(February 12, 1908.)

This cause came on to be heard April 23 and 24, 1907, upon the transcript of the record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

On consideration whereof, It is now, to wit, February 12, 1908, here ordered, adjudged and decreed as follows: The judgment of t. District Court and the verdict therein are set aside; and the case is remanded to that court for further proceedings in accordance with law.

By the Court, JOHN G. STETSON, *Clerk.*

Order of court staying mandate.

(March 18, 1908.)

Upon the application of the defendant in error for a stay of the mandate pending certiorari proceedings, It is ordered that the mandate herein be stayed till further order of court.

By the Court.

JOHN G. STETSON, *Clerk.*

254 Certificate of clerk of Circuit Court of Appeals.

United States Circuit Court of Appeals for the First Circuit.

JOHN W. DICKINSON, DEFENDANT, plaintiff in error, *vs.* UNITED STATES OF AMERICA, PLAINTIFF, defendant in error.	No. 681.

Clerk's certificate.

I, Francis M. Fogarty, clerk *pro tempore* of the United States Circuit Court of Appeals for the First Circuit, certify that the pages numbered 1 to 220, inclusive, hereto prefixed, contain and are a true copy of the writ of error to the District Court of the United States

for the District of Massachusetts, and the return of said District Court thereon, in the cause entitled in said District Court.

THE UNITED STATES, BY INDICTMENT,
vs.
GEORGE M. FOSTER AND JOHN W. DICKINSON. Docket. No. 180, Criminal

I further certify that the pages numbered 221 to 252, inclusive, hereto prefixed, contain and are a true copy of the opinion of said Circuit Court of Appeals and a dissenting opinion in said cause, and that the page numbered 253 contains and is a true copy of the final judgment entered in said cause in said Circuit Court of Appeals, on February 12, 1908, and of the order of court staying the mandate till further order of court.

I further certify that said pages numbered 1 to 253, inclusive, contain and are a true copy of the record and all proceedings in said cause in said Circuit Court of Appeals, to and including April 13th, 1908.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this thirteenth day of April, A. D. 1908.

[SEAL.] FRANCIS M. FOGARTY,
Clerk pro tempore.

255 UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the honorable the judges of the United States Circuit Court of Appeals for the First Circuit, greeting:

Being informed that there is now pending before you a suit in which John W. Dickinson is plaintiff in error and The United States of America is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the district of Massachusetts, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the
256 United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the honorable MELVILLE W. FULLER, Chief Justice of the United States, the 6th day of May, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

257 (Indorsed:) File No. 21134. Supreme Court of the United States. No. 731. October Term, 1907. The United States vs. John W. Dickinson. Writ of certiorari and return of United States Circuit Court of Appeals thereon.

258 In the Supreme Court of the United States. October Term, 1907.

THE UNITED STATES, PETITIONER,
vs.
JOHN W. DICKINSON. } No. 731.

Stipulation as to return.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record therein now on file in the office of the clerk shall be taken as the return of the clerk of the Circuit Court of Appeals for the First Circuit to the writ of certiorari issued herein.

H. M. HOYT,
Solicitor-General.
POWERS & HALL,
Counsel for Respondent.

MAY 6, 1908.

259 *Return on writ of certiorari.*

United States Circuit Court of Appeals for the First Circuit.

And now here the judges of the United States Circuit Court of Appeals for the First Circuit make return of this writ by annexing hereto and sending herewith a stipulation between counsel for the respective parties in the cause in the Supreme Court of the United States wherein this writ of certiorari issued, "that the certified copy of the transcript of the record therein now on file in the office of the clerk shall be taken as the return of the clerk of the Circuit Court of Appeals for the First Circuit to the writ of certiorari issued herein."

In testimony whereof I, Charles K. Darling, clerk of said United States Circuit Court of Appeals for the First Circuit, hereto set my hand and affix the seal of said court at Boston, in said First Circuit, this ninth day of May, A. D. 1908.

[SEAL.] CHAS. K. DARLING, *Clerk.*

260 (Indorsement on cover:) File No. 21134. Supreme Court U. S. October Term, 1907. Term No., 731. The United States vs. John W. Dickinson. Writ of certiorari and return thereto. Filed May 11th, 1908.

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In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES, PETITIONER,
v.
JOHN W. DICKINSON. } No. ——.

STATEMENT OF THE CASE.

This is a petition by the Government, under section 6 of the act of March 3, 1891, for a writ of certiorari in a criminal case involving an important question of constitutional construction.

The question, review of which is sought, is, briefly stated, whether or not, when a defendant charged with a misdemeanor is put upon his trial in a Federal court and twelve duly qualified jurors are sworn to try the issue and, the tribunal to which he is entitled by law having thus been constituted, his trial proceeds before such a jury, and thereafter, during the progress of the trial, two of the jurors are incapacitated, and the defendant, in writing, over his own signature, requests that the case proceed to a verdict by the remaining ten jurors, and the Government assents, and a verdict of guilty is rendered, he can then have judgment against him arrested on the ground that he has been deprived of a constitutional right which he could not waive.

37382—08——1

The respondent, a depositor in the South Danvers National Bank, and John W. Foster, the cashier of the bank, were jointly indicted in a single indictment in fifteen counts, covering fourteen separate transactions, at the December term, 1900, of the District Court of the United States for the District of Massachusetts, under section 5209 of the Revised Statutes, which is as follows:

> Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

After demurrers to the indictment had been overruled, the defendants each pleaded not guilty, and were put upon their trial, January 7, 1902. The trial proceeded until January 28, 1902, when the case was taken from the jury because one of the jurors was found in contempt by reason of intoxication. A second trial began on January 14, 1903, and resulted on March 20, 1903, in a verdict of guilty as to both defendants. At a subsequent term, on March 23, 1905, a motion in arrest of judgment was filed and overruled, a bill of exceptions allowed, and this respondent was sentenced, on August 10, 1906, to a term of nine years in jail. He thereupon sued out a separate writ of error from the Circuit Court of Appeals for the First Circuit, accompanied by a bill of exceptions, which raised questions as to (*a*) the sufficiency of the indictment, (*b*) the admissibility of certain evidence at the trial, and (*c*) the motion in arrest of judgment filed after the close of the term at which the verdict was rendered, and based upon the fact that the verdict was returned by a panel of ten jurors only, the right to a full panel having been expressly waived by the accused in writing at the trial and in open court.

With regard to the questions concerning the sufficiency of the indictment and the admission of evidence at the trial, the Court of Appeals found no error. As to the third assignment, however, the motion to arrest judgment on the ground that the trial was invalid because the verdict was

rendered by ten jurors and not by twelve, a majority of the court sustained the respondent's contentions, reversed the judgment of the District Court, set aside the verdict therein, and remanded the case for further proceedings in accordance with law. A dissenting opinion was rendered by Aldrich, J., supporting the Government's claim that, upon the facts shown by the record, the judgment upon the verdict was valid. It is for a determination of this constitutional question of great practical importance and of frequent recurrence in the administration of criminal justice, that your petitioner prays this writ of certiorari.

As briefly as possible the essential facts upon which this question arises are these:

The defendants were put upon their second trial, as already stated, on January 14, 1903, before a jury of twelve men duly qualified and sworn, and the trial progressed until January 27, 1903, when it was found that one of the jurors impaneled was unable to sit longer owing to illness. The following stipulation, signed by each defendant *in propria persona*, was thereupon filed (Rec., 48):

> Whereas one of the jurors impanelled to try the above-entitled indictment is unable by reason of illness to further sit therein,
>
> Now, therefore, we consent and agree that the said juror, to wit, Charles F. Low, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining eleven ju-

rors with the same force and effect as if said juror had not been discharged.

JOHN W. DICKINSON.
GEORGE M. FOSTER.
THE UNITED STATES,
By BOYD B. JONES,
Special Assistant U. S. Attorney.

Upon the filing of this stipulation, the court continued the trial with the eleven remaining jurors until March 18, 1903, when one of the eleven asked to be excused from sitting further on account of the death of his father, and thereupon the following stipulation, also signed by the defendants in person, was filed (Rec., 49):

> Whereas one of the jurors impanelled to try the above-entitled indictment is unable by reason of a death in his family to further sit therein,
>
> Now, therefore, we consent and agree that the said juror, to wit, Edward E. Stockman, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining ten jurors with the same force and effect as if said juror had not been discharged.
>
> JOHN W. DICKINSON.
> GEORGE M. FOSTER.
> BOYD B. JONES,
> *Special Assistant U. S. Attorney.*

The court thereupon proceeded with the trial before the ten remaining jurors (Rec., 52, 53), and they returned a verdict of guilty on the following day. In both instances the stipulations filed

were signed personally, as has been stated, by the defendants, after conferences participated in by the court, counsel for the Government, counsel for the defendants, and the defendants themselves, at whose request the trial proceeded, first with eleven and then with ten jurors, to a verdict, the validity of which with respect to the number of jurors who returned it was not questioned until, more than two years later, namely, on March 23, 1905, a motion in arrest of judgment (Rec., 51) was filed alleging in substance that the verdict was unlawful because found by a jury of ten.

ARGUMENT.

Special reasons why certiorari should issue.

1. This case involves a constitutional question, the importance and far-reaching effect of which can not be easily exaggerated.

2. The question, it is conceded, has never been passed upon by this court.

3. The occasion for application of the principle contended for by the United States is of frequent occurrence in the trial of criminal cases, and the denial of that principle absolutely prevents the Government and a defendant from entering into a stipulation, even in the case of a misdemeanor, which would oftentimes save great expense to both parties and great loss of time to the court.

4. The majority opinion of the Circuit Court of Appeals is directly contrary to the law of Massachusetts as laid down by Chief Justice Shaw. (*Commonwealth* v. *Dailey*, 12 Cush., 80.)

5. It overrides the uniform practice in Massachusetts, Maine, and New Hampshire, and which, it is believed, prevails generally throughout the United States.

6. The question is vital to the case at bar, for if the decision of the Court of Appeals stands, it will, though not a final judgment, result—because of lapse of time and loss of evidence which preclude the possibility of another trial—in the escape of the defendant from the consequences of a serious offense of which, after a three months' trial, ten men, by whose decision he agreed to abide, have found him guilty.

7. It is also, perhaps, not unworthy of consideration that the decision of the majority of the court incidentally allows the defendant to profit by conduct which, measured by ordinary standards, was a deliberate breach of good faith on his part toward the court and toward the Government.

8. Of the four judges who have already passed upon the question, including the trial judge, two (Lowell, circuit judge, and Aldrich, district judge) have upheld the contention of the Government.

I.

This case involves a constitutional question, the importance and far-reaching effect of which can not easily be exaggerated.

For the first time in the history of constitutional construction, it is held in this case, by a majority of the Circuit Court of Appeals, that the Constitution, Art. III, sec. 2, and the Sixth Amendment, prescribe abso-

lutely that a jury for the trial of all criminal offenses must consist, from beginning to end, of twelve men; that the panel can not be weakened by consent or waiver of the defendant and the Government; and that a verdict rendered by a panel reduced to less than twelve is unlawful, even though the defendant agrees to the reduction. In other words, that there is a constitutional inhibition of any power on the part of a defendant and the Government to agree to waive a verdict by a full jury by consenting to what has been termed a "fractional loss."

As against such a doctrine the Government contended, and still contends, that if a defendant in a criminal case is not denied the right to a trial by jury, *and a full panel is sworn*, and the tribunal to which he is entitled by law having thus been constituted, his trial begins before it; and if thereafter, during the progress of the trial, one or more of the jurors is incapacitated, and the defendant personally requests, because of the expense or delay incident to another trial, or for any other reason, that the case proceed to a verdict by the remaining jurors, and the Government assents, and a verdict of guilty is rendered, he can not have a judgment against him arrested on the ground that he has thereby been deprived of a constitutional right which he could not waive.

This contention of the Government is fully sustained, and the grounds on which it is based stated in the dissenting opinion of Judge Aldrich.

The Government did not contend that a defendant could, before his trial, agree that the tribunal before which he was to be put upon trial should be made up of a judge and *less than twelve jurors*, because the defendant would then be consenting to the creation of something which was not a court. What the Government contended was, that if, on the other hand, jurisdiction over the trial is obtained by the organization of a constitutional court, and the court so constituted is subsequently diminished, with the defendant's consent, by one or two jurors, the trial may proceed and a lawful verdict be taken from the jury which has in this way suffered a "fractional loss."

With all deference to the conclusions of the majority of the learned judges of the Circuit Court of Appeals, it is submitted that the error of their opinion lies in the fact that it makes no distinction between an agreement on the part of the defendant to be tried by an illegally constituted tribunal—that is to say, one *originally made up in a manner contrary to the requirements of law*—and an agreement, after the tribunal has been in all respects legally constituted, to assent to that which, in the apt language of Mr. Justice Holmes in *Interstate Consolidated Street Railway Company* v. *Massachusetts* (207 U. S., 79), may be termed a "fractional loss." This distinction is clearly pointed out in the dissenting opinion of Judge Aldrich.

II.

The question, it is conceded, has never been passed upon by this court.

Neither the Government nor the respondent has been able to discover that this court has ever passed upon the precise point here raised, and both the majority and dissenting opinions of the Circuit Court of Appeals assume that it is an open question in the Federal courts (Rec. 227, 244). Compare, however, *Schick* v. *United States* (195 U. S., 65); *Queenan* v. *Oklahoma* (190 U. S., 548, 551); *Hawaii* v. *Mankichi* (190 U. S., 197, 217); *Dorr* v. *United States* (195 U. S., 138, 148).

III.

The occasion for application of the principle contended for by the United States is of frequent occurrence in the trial of criminal cases, and the denial of that principle absolutely prevents the Government and a defendant from entering into a stipulation, even in the case of a misdemeanor, which would oftentimes save great expense to both parties and great loss of time to the court.

"If the constitutional safeguard," as Judge Aldrich puts it in his dissenting opinion, "is so hard and fast that an accused, who has been subjected to a constitutional trial for three months, can not waive a fractional part of the right which he has enjoyed in order to save his substantial right and get a result, but must be subjected to the burdens of another trial with perhaps the same dilemma, it will become an instrument of oppression rather than one of protection, and thus the preventive will become some-

thing worse than the apprehended danger." (Rec. 238.)

And again, "So far as practical consequences to the liberties of accused parties are concerned, a hard and fast rule of law which denies the right of an accused to waive the loss of a juror, stricken from the panel by sickness or death, during the progress of the trial, would be far more dangerous and intolerable than a rule which accords to an accused, upon written application, joined by the Government, and under the approval of the court, the right to waive the fractional loss whereby he may establish his right to liberty and save to himself the expense, the delay and the oppressive imprisonment incident to another trial." (Rec. 247.) And again, "Not speaking now of questions of good or bad faith to courts charged with the administration of justice, or of general public considerations, a construction of the constitutional provision—establishing the right of trial by jury as something for the general benefit of society, but for the special benefit of those accused of crime—which would compel, or permit, the Government to stop and send an accused to another trial, and perhaps to repeated trials, in a misdemeanor case, through a denial of the right, when he wants to exercise it, to waive a fractional loss from a constitutional trial once entered upon, would often render the provision an instrument of oppression and, as a result, in many instances, 'trial by jury itself, instead of being a security to persons who are accused, will be a delusion, a mockery, and a snare.'" (Rec. 251, 252.)

There is no need of statistics, if any were available, to support the statement that the occasion frequently arises in the course of criminal trials when both the Government and accused would like to proceed to a verdict before a jury which has been reduced by sickness or death to less than twelve. If such a proceeding is not violative of the Constitution, it is extremely important that the court of last resort should so proclaim.

IV.

The majority opinion of the Circuit Court of Appeals is directly contrary to the law of Massachusetts as laid down by Chief Justice Shaw. (Commonwealth v. Dailey, 12 Cush., 80.)

That the opinion of the Circuit Court of Appeals is at direct variance with the law of Massachusetts on this question is admitted by the court in its opinion. (Rec. 227.) The case of *Commonwealth* v. *Dailey*, in which the Massachusetts rule of law on this question was clearly and forcefully enunciated, was one in which persons, on trial for a misdemeanor with a full panel, waived, by agreement with the court, the attendance of one juror, and on verdict of guilty by the remaining eleven attempted to avoid the judgment. As the accused (in the case last cited) were advised as to their rights and still insisted on the trial proceeding, the court declared that it was inconsistent with good faith for them to insist now on this legal exception. This applies to civil cases, and has the same application to criminal proceedings, even in the case of felony. Here, therefore, is a precedent in the case

of misdemeanor where the defendant had expressly waived the attendance of one juror, with the consent of the court, and the point decided in 1853 by the highest court and the greatest judge of Massachusetts, and generally accepted and followed throughout the country in the practical administration of criminal justice in respect to misdemeanor trials at least, ought not to be set aside except by the highest authority, and the Government submits that this direct conflict between a decision of the Circuit Court of Appeals sitting in Massachusetts and the highest court of Massachusetts furnishes an exceptional reason why the Supreme Court of the United States should review this case on certiorari. The reason becomes stronger still because—

> The principle of *Commonwealth* v. *Dailey* was expressly recognized by the Supreme Court in *Schick* v. *United States* (195 U. S. 65), where, after saying, "When there is no constitutional or statutory mandate and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy," and that "authorities in the state courts are in harmony with this thought," the opinion quotes approvingly the opinion of Chief Justice Shaw, that "he may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court," and cites various state authorities sustaining the principle involved. (Dissenting opinion of Judge Aldrich, Rec. 246.) *See Forsyth* v. *Hammond, infra.*

V.

It overrides the uniform practice in Massachusetts, Maine, and New Hampshire, and which, it is believed, prevails generally throughout the United States.

Not only is the decision of the Circuit Court of Appeals directly at variance with the settled law on the point in controversy in Massachusetts, but it overrides and disapproves of the uniform practice which has prevailed in Maine and New Hampshire and, it is believed, very generally throughout the United States for generations. (See majority opinion, Rec. 227; Opinion of Justices, 41 N. H. 550, 552; cited, 174 U. S., 1, 15; *State* v. *Almy* (67 N. H. 274, 280); *State* v. *Worden* (46 Conn. 349, 364, 366); *Fields* v. *United States* (205 U. S. 292, 296).

VI.

The question is vital to the case at bar, for if the decision of the Court of Appeals stands it will, though not a final judgment, result, because of lapse of time and loss of evidence, which preclude the possibility of another trial, in the escape of the defendant from the consequences of a serious offense of which, after a three months' trial, ten men, by whose decision he agreed to abide, have found him guilty.

As has been observed, the verdict of guilty against this respondent was rendered in March, 1903. No question was made at that time that the verdict was unlawful because it had been returned by ten jurors rather than twelve, and it was not until more than two years later, namely, on March 23, 1905, that a motion in arrest of judgment (Rec., 51) was filed by

new counsel whom the respondent had engaged, which motion alleged in substance that the verdict was unlawful because found by ten jurors. The record was made up as rapidly as could be. The questions reserved were argued before the Circuit Court of Appeals on April 23 and 24, 1907, and the decision which it is now sought to have reviewed was handed down on February 12, 1908.

Five years, therefore, have elapsed since the respondent was convicted, and the practical result in this case will inevitably be (by reason of the lapse of time and loss of evidence) a *nolle prosequi*, and the consequent escape from punishment of one whom, after a protracted and expensive trial, ten men have found guilty of a serious offense under the national banking act.

VII.

It is also, perhaps, not unworthy of consideration that the decision of the majority of the court incidentally allows the defendant to profit by conduct which, measured by ordinary standards, was a deliberate breach of good faith on his part toward the court and toward the Government.

The two jurors who left the panel in this case were excused for substantial reasons. The defendants were advised by counsel, and fully informed of their rights by the court. They not only in open court personally signed the agreement of waiver without inducement from the Government, but requested the Government to proceed with the trial before the

jury as then constituted. (Rec., 52, 53.) Whatever the reasons which induced them to make the waiver, it seems to the Government that, having solemnly agreed to let the controversy be determined by ten men and to take the chance of securing an acquittal, it is in violation of all principles of fair dealing that the respondent should decline to abide by the result and be permitted to avoid the consequences of his deliberate election; and this is so upon reasonable grounds of general good faith as well as upon the principles of waiver and estoppel.

> That, doubtless, is the English view in respect to the application of such principles to analogous situations, involving weightier consequences in cases of felonies; and there is no sufficient reason why it should not hold good here in misdemeanor cases. (Dissenting opinion of Judge Aldrich, Rec., 248.)

VIII.

Of the four judges who have already passed upon the question, including the trial judge, two (Lowell, circuit judge, and Aldrich, district judge) have upheld the contention of the Government.

It may not be amiss to remind the court that the judges of the courts below who, at the trial and on appeal have had to pass upon this question, stand evenly arrayed upon it, Putnam and Brown, JJ., denying the power of waiver, and Lowell and Aldrich, JJ., asserting it.

JURISDICTION.

(1) This court has authority to issue its writ of certiorari upon application of the Government to review the question involved in this case.

The petition is brought under section 6 of the act of March 3, 1891.

The question immediately arises whether the court has authority under that act to grant the writ. The case of *United States* v. *Sanges* (144 U. S., 310) was a writ of error sued out by the United States to review the judgment of the Circuit Court of the United States for the Northern District of Georgia, whereby sections 5508 and 5509 of the Revised Statutes, under which the defendants were indicted, were held to be unconstitutional. By section 5 of the Circuit Court of Appeals act it was provided that appeals or writs of error may be taken from the district courts or from existing circuit courts direct to the Supreme Court in any case that involves the construction or application of the Constitution of the United States.

Under this clause a writ of error was sued out by the United States. The court held, however, that in the absence of specific statutory authority there was no right on the part of the Government to a writ of error in a criminal case, even though such case involved a constitutional question.

The material language of section 6 of the Circuit Court of Appeals act is:

> * * * And excepting also that in any such case as is hereinbefore made final in the

> Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

If a writ of certiorari is substantially a writ of error under this section, the *Sanges* case is controlling and this petition must be denied.

It is submitted, however, that the writ of certiorari under this act is, as at common law, a writ simply for the removal of a cause from an inferior to a superior court.

While certiorari may be equivalent in its consequences to a writ of error or an appeal, it is not, like them, a writ of right, but is granted only in the discretion of the court and not allowed *ex debito justitiae*. In England the power to issue certiorari was inherent in the court of the King's Bench, and could not be taken away except by express legislative enactment. (*Rex* v. *Cashiobury*, 3 Dowl. & R., 35.) At common law, therefore, the very important distinction exists between certiorari and appeal in that the former always lies, and can not be taken away except by express legislative enactment, while the latter never lies unless expressly granted. While courts of the United States derive their powers from the Constitution and constitutional acts of Congress, and have, therefore, only such authority to issue writs as may be conferred upon them constitutionally, yet, when once

they have been invested with authority to issue writs, defined and having a certain significance at common law, the nature of the authority and character of the writs which they are authorized to issue may find a meaning and description from the rule of common law. Thus it may well be that the distinction at common law between appeal and certiorari, so far as the power to resort to them is concerned, may find its way into the construction of the language of Congress conferring the power to resort to them.

The power granted to entertain appeals is a power to be exercised on behalf of parties *as a matter of right*, and the construction of language conferring the power as at common law is strict, and the Government as a party does not, as this court has said, have the right in a criminal case without express enactment of it. On the other hand, the power to issue certiorari is one not to be exercised in behalf of parties as a matter of right, but in the discretion of the court. So again, a different construction, as at common law, is here to be given language conferring this power. The governing reason for this distinction may be that the writ of appeal is a writ of right, authorized in the interest of parties to controversies, while a writ of certiorari is a writ by which a superior court exercises the power to review in its discretion, irrespective of the parties or of a request by either of them, the subject in controversy.

Again, certiorari can not be a mere substitute for a writ of error or an appeal because, as has been held

in the case of *American Construction Company* v. *Jacksonville, Tampa & Key West Railway* (148 U. S., 372, 385), the writ may issue either before or after final judgment in the Circuit Court of Appeals. If issued before judgment, it could not, of course, perform the office of an appeal or writ of error.

The question raised by the respondent's writ of error involved "the construction or application of the Constitution of the United States," and was, therefore, one which he could have brought directly to this court for decision, although the offense of which he was convicted was not a capital offense. (*Motes* v. *United States*, 178 U. S., 458.)

Section 6 of the act in question provides that—

> Circuit Courts of Appeals * * * shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court * * * in all cases other than those provided for in the preceding section of this act, * * * and the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases * * * under the criminal laws * * * excepting that in every such subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.
>
> * * * *
>
> And excepting also that in any such case as is hereinbefore made final in the Circuit

> Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

While under the fifth section of this act the respondent here might have brought this question directly to this court for decision, he chose to exercise his alternative right under the sixth section to take it on writ of error to the Circuit Court of Appeals. If he had adopted the former course, the Government would have received a final and authoritative determination of the constitutional question involved. The Government contends that it does not lose, and that Congress did not intend that it should lose, the opportunity to have this court finally determine this question by reason of the respondent's act in taking the case to the Circuit Court of Appeals, but that, under the last paragraph of section 6, above quoted, it is still within the discretionary power of this court, on application by the Government, to have it reviewed on certiorari.

The case having been taken to the Circuit Court of Appeals, the Government urges that it was at once, before judgment, within the discretionary power of that court, under the act, to certify the point involved to this court for its review and determination. That it could have been certified by the Circuit Court of Appeals to this court for decision, under the plain

language of the act, there would seem to be no doubt. While, therefore, this question might have come to this court for decision, either by direct act of the respondent or through the exercise of discretionary power vested in the Circuit Court of Appeals by this act, neither the election of the respondent not to sue out his writ of error directly to this court nor the refusal of the Circuit Court of Appeals to exercise affirmatively its discretion to certify can impair or diminish the jurisdiction of this court, under the act, itself to require by certiorari a criminal case involving the construction or application of the Constitution of the United States to be certified to it for its review and determination. (*In re Wong Kim Ark*, 71 Fed. Rep., 382.)

As said by this court in *American Construction Company* v. *Jacksonville, etc., Railway Company* (148 U. S., 372, 382)—

> The primary object of this act, well known as a matter of public history, manifest on the face of the act, and judicially declared in the leading cases under it, was to relieve this court of the overburden of cases and controversies, arising from the rapid growth of the country, and the steady increase of litigation; and, for the accomplishment of this object, to transfer a large part of its appellate jurisdiction to the Circuit Courts of Appeals thereby established in each judicial circuit, and to distribute between this court and those, according to the scheme of the act, the entire appellate jurisdiction from the Circuit and District Courts of the United States.

It seems plain that the purpose of the act was to relieve the great pressure on this court by transferring certain of its appellate jurisdiction to the Circuit Courts of Appeals, and making their decisions final in certain cases. But at the same time it reserved in this court jurisdiction to review whenever it chose, and finally to determine, certain questions which would otherwise be settled in the Circuit Courts of Appeals. In other words, the right to the appellate jurisdiction of this court over certain cases, formerly given to parties except the United States in criminal cases, as a matter of right, was withdrawn from them by this act, but the discretionary power of this court itself to review on certiorari the cases specified by the act was not impaired.

As has been said by this court, the act—

> Was intended to vest in this court a comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the Court of Appeals. It may be exercised before or after any decision by that court and irrespective of any ruling or determination therein. All that is essential is that there be a case pending in the Circuit Court of Appeals, and of those classes of cases in which the decision of that court may, by virtue of this clause, reach out its writ of certiorari and transfer the case here for review and determination. (*Forsyth* v. *Hammond*, 166 U. S., 506, 513.)

And again:

> We reaffirm in this case the propositions heretofore announced, to wit, that the power

> of this court in certiorari extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court. (*Forsyth* v. *Hammond*, *supra*.)

In view of the foregoing, the Government contends that, under section 6 of the Circuit Court of Appeals act, Congress left in this court jurisdiction, which it may exercise or decline to exercise at its pleasure, for the review and determination of such a question as that presented by this case, namely, the construction of Article III, Section 2, and the Sixth Amendment, of the Constitution raised by writ of error in a criminal case in the Circuit Court of Appeals by the respondent here, which, unless reviewed by this court, will be final there.

It may be objected that the decision of the Circuit Court of Appeals is not final, but merely sets aside a verdict and orders a new trial. While this is theoretically true, it is not so in this case, as has been already pointed out. The judgment of the Circuit Court of Appeals will inevitably result in terminating the prosecution against the respondent, and for all practical purposes the decision, therefore, is final. By his own act, the respondent, after judgment, instituted proceedings, which have consumed a period of five years, and it will be impossible, owing to loss of evidence through the lapse of so much time, and the absence or death of witnesses, to try

him again. Under such circumstances can it be said, whatever the language of the court's decree, that the ruling is not final, at least as to this case, and shall the respondent here be allowed to avail himself of a technicality, which he has brought about by his own act involving the grossest breach of faith on his part?

It is submitted that the case now presented comes well within the cases in which this court has deemed the exercise of its discretionary power of review warranted by the exigencies of the situation.

In *Forsyth* v. *Hammond*, *supra*, this court, referring to the power to review on certiorari, said that——

> While this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all Courts of Appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal and the courts of a State, or some matter affecting the interest of this nation in its internal or external relations, demands such exercise.

As already pointed out, the question is one of peculiar gravity and general importance, and an authoritative determination of the constitutional point raised is necessary in order to secure uniformity of decision between the Circuit Court of Appeals and the courts of the States on a question far-reaching in its effects

upon the administration of criminal justice in this country.

This court is not now, for the first time, asked by the United States to review on certiorari a criminal case decided adversely to the Government by an inferior court. Such a review was granted in *United States* v. *Cadarr* (197 U. S., 475).

(2) The authority conferred by the act in question to issue the writ of certiorari as claimed by the Government is a constitutional exercise of the power of Congress.

A discussion of the power of Congress to permit an appeal or writ of error in favor of the Government in a criminal case did not arise in the *Sanges* case, and this court in that case did not decide that Congress had no such power. On the contrary, in the recent case of *United States* v. *Macdonald* (207 U. S., 120), in which the defendant urged that the United States could not be allowed a writ of error in a criminal case under the act of March 2, 1907, this court said:

> We do not perceive the difficulty. No doubt of the power of Congress is intimated in *United States* v. *Sanges*, 144 U. S. 310. If the Fifth Amendment has any bearing, the act of 1907 is directed to judgments rendered before the moment of jeopardy is reached.

And in the case of the *United States* v. *John Bitty* (not yet reported) the court, speaking through Mr. Justice Harlan, said:

> Except in cases affecting ambassadors and other public ministers and consuls and those

in which a State shall be a party—in which cases this court may exercise original jurisdiction—we can exercise appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make in the other cases to which by the Constitution the judicial power of the United States extends. (Const. Art. III, sec. 2). What such exceptions and regulations should be it is for Congress, in its wisdom, to establish, having of course due regard to all the provisions of the Constitution. If a court of original jurisdiction errs in squashing, setting aside, or dismissing an indictment for an alleged offense against the United States, upon the ground that the statute on which it is based is unconstitutional, or upon the ground that the statute does not embrace the case made by the indictment, there is no mode in which the error can be corrected and the provisions of the statute enforced, except the case be brought here by the United States for review. Hence,—that there might be no unnecessary delay in the administration of the criminal law, and that the courts of original jurisdiction may be instructed as to the validity and meaning of the particular criminal statute sought to be enforced—the above act of 1907 was passed. Surely such an exception or regulation is in the discretion of Congress to prescribe, and does not violate any constitutional right of the accused. (*Taylor* v. *United States*, 207 U. S., 120.)

We conclude, therefore, that when the question of jeopardy is eliminated there is no doubt of the power of Congress to authorize a writ of certiorari upon the application of the Government in a criminal case, such as the one now presented.

And the consideration of the question of jeopardy has been eliminated in this case by the defendant's own act. The writ of error to review the judgment of the district court was sued out from the Circuit Court of Appeals by the respondent here. As in *Trono* v. *United States* (199 U. S., 521, 534) it was held that when a plaintiff in error, at his own request, has obtained a new trial, "he must take the burden with the benefit," it follows he must abide by the result of suing out the writ. While, of course, in this case, the respondent has been placed in jeopardy, the question of jeopardy is eliminated, as already has been observed, by the defendant's own act in seeking relief from a judgment which, the Government urges, was valid, and it is respectfully submitted that he must abide by the consequences of his act, as in *Trono* v. *United States, supra.*

To briefly recapitulate, the exigency under which review is prayed for here is this:

A constitutional question of great general interest and of vital practical importance to the specific case in which it is raised has, after a verdict of guilty and judgment thereon, been carried on error to the Circuit Court of Appeals in the District of Massachusetts. The question is one which has frequently arisen in

trials, and is likely to arise repeatedly again, and it will be of incalculable advantage to have it authoritatively determined. The same question has been decided by the highest court of Massachusetts in an opinion by one of the greatest judges whom this country has ever produced, and the uniform practice is in accordance with that decision. This court has never passed upon it.

The Circuit Court of Appeals in a majority opinion has refused to follow Chief Justice Shaw, and has entered an order which must, if it is allowed to stand, result in a *nolle prosequi*, and in the defendant's escape from punishment. The situation, the consequences of which he sought to avoid in the Circuit Court of Appeals, was one which was created at the defendant's request and of his own deliberate choice.

Jurisdiction to review the question seems clearly to have been reserved in this court under section 6 of the Circuit Court of Appeals act.

For the foregoing reasons the United States respectfully prays the court to issue its writ of certiorari to review and settle the important question here involved.

HENRY M. HOYT,
Solicitor-General.

ASA P. FRENCH,
United States Attorney.

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In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES, PETITIONER,
v.
JOHN W. DICKINSON. } No. 731.

MOTION TO ADVANCE.

This case arose under the national banking laws. The respondent Dickinson and one Foster, officers of the South Danvers National Bank, were convicted in the District Court of the United States for the District of Massachusetts of a violation of section 5209 of the Revised Statutes. At the first trial of the case the jury was discharged for misconduct. During the progress of the second trial two of the jurors, becoming incapacitated, were excused, and the trial, at the request of the defendants, proceeded with a jury of ten men. After conviction Dickinson sued out a separate writ of error from the United States Circuit Court of Appeals for the First Circuit, which court set aside the verdict and remanded the case for further proceedings on the ground that the defendant, respondent here, had been deprived of a constitutional right which could not be waived. The Government submitted to this court a petition for a writ of certiorari, which was granted on May 4 last.

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Because of the importance of the constitutional question involved, and in accordance with rule 26, section 3, the case being a criminal one, the Solicitor-General respectfully moves the court to advance the case for hearing on such day during the next term as may be convenient to the court.

Notice of this motion has been served upon opposing counsel.

HENRY M. HOYT,
Solicitor-General.

JUNE, 1908.

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In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PETITIONER,
v.
JOHN W. DICKINSON. } No. 362.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE AND THE QUESTIONS RAISED.

This is a criminal case involving the construction and application of the Constitution of the United States, of which the Circuit Court of Appeals for the First Circuit acquired jurisdiction on writ of error, reversed a judgment rendered upon a verdict of guilty against this respondent in the District Court for the District of Massachusetts, and remanded the case to that court for further proceedings. It is brought here for review on a writ of certiorari to the Circuit Court of Appeals issued on the petition of the United States under section 6 of the act of March 3, 1891 (26 Stat., 826, 828).

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The material language of the section referred to is familiar, and is as follows:

> The judgments or decrees of the circuit courts of appeals shall be final * * * in all cases arising * * * under the criminal laws * * *.
>
> In any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

The questions to be determined preliminary to a decision upon the merits of the controversy between the United States and this respondent are:

(1) Does the Government present a case within the class defined in *Forsyth* v. *Hammond* (166 U. S., 506, 514, 515), in *Fields* v. *United States* (205 U. S., 292, 296), and elsewhere? If so,

(2) Is the rule laid down in *Forsyth* v. *Hammond* (*supra*, at pp. 511 *et seq.*), determining the power of this court to review on certiorari the decisions of the circuit courts of appeal, inapplicable because this is a criminal case and the United States is the petitioner? If not,

(3) Does the fact that the judgment of the Circuit Court of Appeals did not dispose of the case, but

merely sent it back for a new trial, preclude this court from assuming jurisdiction over it?

In other words, and more concisely stated, Has this court power to review a criminal case on certiorari to a circuit court of appeals, at the suggestion of the Government, if the question involved is one of gravity and general importance, and the judgment of the Circuit Court of Appeals was, in effect, that a verdict of guilty be set aside and a new trial granted?

Although the question of power involved in this inquiry is more important than that of propriety, and although we are, perhaps, justified in assuming that the latter question, in the language of Mr. Justice Brewer in *Forsyth* v. *Hammond* (*supra*), is to be "considered as foreclosed by the action of the court in awarding the writ of certiorari," particularly as it was discussed at some length in our brief accompanying the petition for the writ, it seems to us important to a complete and intelligent presentation of the case to restate briefly, at the outset, the grounds upon which this court was asked to review it.

The only question upon which the case was decided adversely to the United States by the Circuit Court of Appeals is one of constitutional construction of great and general importance, as to which that court, upon a majority opinion, is in conflict with the Supreme Court of Massachusetts, with the law as

applied in practice in the courts of New Hampshire and Maine, in the same circuit, and, it is believed, generally throughout the United States in both federal and state courts. Briefly stated, the question is this:

If a defendant charged with an infamous crime, designated a misdemeanor by the statute creating it, is put upon trial in a federal court, and twelve duly qualified jurors are sworn to try the issue, and, the tribunal to which he is entitled by law having thus been constituted, his trial proceeds before it, and thereafter, during the progress of the trial, two of the jurors are incapacitated, and the defendant requests, and in writing over his own signature, consents that the case proceed to a verdict by the remaining jurors, and the Government assents, and a verdict of guilty is rendered, can he then have judgment against him arrested on the ground that he has been deprived of a constitutional right which he could not waive? or, as his counsel apparently prefer to put it, *on the ground that he has never been tried at all?*

All other questions raised by the defendant's assignment of errors in the Circuit Court of Appeals were answered by that court in favor of the Government, and counsel for the defendant have waived in this court all except the constitutional question already stated (assignments 53 and 54; Rec., p. 159); the question of the sufficiency of the indictment raised by the demurrer and additional demurrer (Rec., pp. 28, 32; assignments 1, 2, and 3, Rec., pp. 151, 152). These two, then (covered by assignments 1, 2, 3,

53, and 54), are the only questions involving the merits of the controversy which survive for argument in this court. They arose under the following circumstances:

The respondent, a depositor in the South Danvers National Bank, of Peabody, Massachusetts, and George M. Foster, the cashier of the bank, were jointly indicted in a single indictment in fifteen counts, covering fourteen separate transactions, at the December term, 1900, of the District Court for the District of Massachusetts, under section 5209 of the Revised Statutes, which is as follows, the portions applicable to this indictment being printed in italics:

> *Every* president, director, *cashier,* teller, clerk, or agent *of any association, who* embezzles, abstracts, or *willfully misapplies any of the moneys, funds, or credits of the association;* or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, *with intent,* in either case, *to injure or defraud the association* or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; *and*

> *every person who with like intent aids or abets any officer,* clerk, or agent *in any violation of this section, shall be deemed guilty of a misdemeanor,* and shall be imprisoned not less than five years nor more than ten.

The indictment charges, in substance, that in fourteen specific instances Foster, as cashier of the bank, with intent to defraud the bank, willfully misapplied its moneys, funds, and credits by unlawfully converting them to the use of Dickinson, this respondent, and that Dickinson aided and abetted him in such misapplication.

It was the contention of the Government at the trial, and the evidence introduced tended to show, that the misapplications charged in the indictment were made by unlawfully converting the funds of the bank through the payment by the bank, with the knowledge and by direction of Foster, of checks drawn by Dickinson when the latter had not on deposit a balance sufficient to meet the checks; that these checks were not entered in the ledger but were carried as cash in the drawer for a considerable period so that Dickinson's account on the ledger would not show an overdraft; that these overdrafts were covered by notes and renewal notes sent by Dickinson to the bank, where they were discounted and the proceeds credited to his account before the checks were charged on the ledger; that both Foster and Dickinson knew these notes to be worthless, and that they acted in concert with intent to defraud the bank.

After demurrers to the indictment had been overruled the defendants each pleaded not guilty and were put upon their trial January 7, 1902. The trial proceeded until January 28, 1902, when the case was taken from the jury because one of the jurors was found in contempt by reason of intoxication. A second trial was begun on January 14, 1903, before a jury of twelve, duly qualified and sworn, and progressed until January 27, 1903, when it was found that one of the jurors impaneled was unable to sit longer, owing to illness. The following stipulation, signed by each defendant *in propria persona*, was thereupon filed (Rec., p. 40):

> Whereas one of the jurors impanelled to try the above-entitled indictment is unable by reason of illness to further sit therein,
>
> Now, therefore, we consent and agree that the said juror, to wit, Charles F. Low, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining eleven jurors with the same force and effect as if said juror had not been discharged.
>
> JOHN W. DICKINSON.
> GEORGE M. FOSTER.
> THE UNITED STATES,
> By BOYD B. JONES,
> *Special Assistant U. S. Attorney.*

Upon the filing of this stipulation, the court proceeded with the trial before the eleven remaining jurors until March 18, 1903, when one of the eleven

asked to be excused from sitting further on account of the death of his father; and thereupon the following stipulation, also signed by the defendants in person, was filed (Rec., p. 40):

> Whereas one of the jurors impanelled to try the above-entitled indictment is unable, by reason of a death in his family, to further sit therein,
>
> Now, therefore, we consent and agree that the said juror, to wit, Edward E. Stockman, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining ten jurors with the same force and effect as if said juror had not been discharged.
>
> JOHN W. DICKINSON.
> GEORGE M. FOSTER.
> BOYD B. JONES,
> *Special Assistant U. S. Attorney.*

The court thereupon resumed the trial before the ten remaining jurors, and, on the second day following (March 20), they returned a verdict of guilty as to both defendants on the *first*, *third*, and *fifteenth counts*; a disagreement as to both on the fourth, fifth, eighth, ninth, and eleventh counts; and not guilty as to both on the second, sixth, seventh, tenth, twelfth, thirteenth, and fourteenth counts. (Rec., pp. 40, 41.) In both instances the stipulations filed were signed personally, as has been stated, by the defendants, after conferences participated in by the court, counsel for the Government, counsel for the defendants, and the defendants themselves, at whose request the trial proceeded, first with eleven and then

with ten jurors, to a verdict, the validity of which with respect to the number of jurors who returned it was not questioned until, at a subsequent term, more than two years later, namely, on March 23, 1905, other counsel having appeared for this respondent, a motion in arrest of judgment (Rec., p. 39) was filed in his behalf, alleging in substance that the verdict was unlawful because found by a jury of ten. This motion was overruled, a bill of exceptions allowed, and this respondent was sentenced, on August 10, 1906, to a term of nine years in jail. He thereupon sued out a separate writ of error from the Circuit Court of Appeals for the First Circuit, accompanied by a bill of exceptions, which raised questions as to (*a*) the sufficiency of the indictment, (*b*) the admissibility of certain evidence at the trial, and (*c*) the motion in arrest of judgment filed after the close of the term at which the verdict was rendered, and based upon the fact that the verdict was returned by a panel of ten jurors only.

With regard to the questions concerning the sufficiency of the indictment and the exclusion of evidence at the trial, the Circuit Court of Appeals, as already stated, found no error. As to the motion to arrest judgment, however, on the ground that the judgment was invalid because the verdict was rendered by ten jurors and not by twelve, a majority of the court (Putnam, circuit judge, and Brown, district judge) sustained the respondent's contentions (Rec., p. 164), reversed the judgment of the District Court, set aside the verdict therein, and remanded the case

for further proceedings in accordance with law. A dissenting opinion was rendered by Aldrich, district judge (Rec., p. 176), supporting the Government's claim that, upon the facts shown by the record, the judgment upon the verdict should stand. The United States thereupon made application for a stay of the mandate, which was granted, and brought the case to the attention of this court through a petition for certiorari.

The special reasons why certiorari should issue, all or most of which were stated upon our brief in support of the petition in this case, are:

(1) A constitutional question is involved, the importance and far-reaching effect of which can not easily be exaggerated. Here, for the first time in the history of constitutional construction, it is held by a majority of the Circuit Court of Appeals that the Constitution (Article III, section 2, and the Sixth Amendment) prescribes absolutely that a jury for the trial of all crimes must consist, from impaneling to verdict, of twelve men; that the panel can not be weakened by consent or waiver of the defendant; and that a verdict rendered by a panel which, originally twelve, has been reduced with the defendant's consent and at his request (Rec., p. 40) to less than that number, is unlawful. In other words, that there is a constitutional inhibition of any power on the part of a defendant to waive by express consent a verdict by a full jury.

(2) This specific question, it is conceded, has never been passed upon by this court.

(3) The occasion for the application of the principle contended for by the United States, due to the death, illness, or other incapacity of jurors impaneled, frequently arises in the trial of criminal cases, and the denial of that principle absolutely prevents the Government and a defendant from entering into a stipulation, even in the case of a misdemeanor, which would oftentimes save great expense to both parties and great loss of time to the court. The fact that there are no decisions upon this precise question in the federal courts and few in the state courts is to be regarded, we believe, not as elsewhere suggested by the respondent, as evidence of the infrequency of such incidents, but rather of the well-nigh universal practice generally accepted and acted upon by courts and the profession, arising from the settled belief that such a waiver is not violative of the provisions of the federal or state constitutions with respect to trial by jury in criminal cases.

(4) The majority opinion of the Circuit Court of Appeals is directly contrary to the law of Massachusetts as laid down by Chief Justice Shaw. (*Com.* v. *Dailey*, 12 Cush., 80; see Rec., p. 171.)

(5) It is at variance with the uniform practice in Massachusetts, Maine, and New Hampshire (Rec., p. 169), a practice which, it is believed, prevails generally throughout the United States.

(6) The question is vital to the case at bar, for, if the decision of the Circuit Court of Appeals stands, though not finally disposing of the case, it will almost inevitably preclude the possibility of another trial

because of lapse of time, and the death or absence of witnesses, and result in the escape of the defendant from the consequences of a serious offense of which, after a three months' trial, ten men, by whose decision he agreed to abide, have found him guilty.

(7) The trial consumed more than two months (Rec., pp. 37, 38), and another trial pursuant to the decree of the Circuit Court of Appeals, even if testimony sufficient to prove the charges in the indictment could now be produced, would needlessly involve great expense to the Government and inconvenience to the court, if the Circuit Court of Appeals erred in holding that there had been a mistrial, or no trial. See *American Construction Company* v. *Jacksonville, Tampa and Key West Railway Company* (148 U. S., 372, 384).

(8) It is also, perhaps, not unworthy of consideration that the decision of the majority of the Circuit Court of Appeals incidentally allows the defendant to profit by conduct which, measured by ordinary standards, was a deliberate breach of good faith on his part toward the court and toward the Government.

(9) Of the four judges who have already passed upon this question, two (Dodge and Aldrich, district judges) have upheld the contention of the Government. (Rec., pp. 41, 176.)

It is under these circumstances, and for these reasons, that the United States asks this court to assert and exercise jurisdiction over this case, to review the proceedings of the Circuit Court of Appeals for the First Circuit therein.

ARGUMENT.

I.

THE QUESTION OF JURISDICTION.

(a) Certiorari at common law and under acts of Congress prior to 1891.

The writ of certiorari is not mentioned by name in the Constitution or the statutes of the United States until the act of March 3, 1891. The First Congress, however (act 1789, c. 20, sec. 14; 1 Stat. 81, which now appears in substance in Revised Statutes, section 716) gave to the supreme, circuit, and district courts "power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." And this court, in *In re Chetwood*, petitioner (165 U. S., 443, 462), by Mr. Chief Justice Fuller, has said that—

> * * * under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *Amer. Construction Co.* v. *Jacksonville Railway* (148 U. S., 372, 380). And although, as observed in that case, this writ has not been issued as freely by this court as by the court of Queen's Bench in England, and, prior to the act of March 3, 1891 (c. 517, 26 Stat., 826), had been ordinarily used as an auxiliary process merely, yet whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice.

The writ of certiorari, therefore, under the Constitution and the statutes of the United States is strictly the common-law writ of that name with all its functions and attributes, so far as applicable to our system of jurisprudence.

At the common law, according to Fitzherbert and Burn, certiorari was an original writ issuing out of the Court of Chancery or the King's Bench, and directed in the King's name to the judges or officers of inferior courts, commanding them to certify or to return the records of a case pending before them, to the end the party may have a more sure and speedy justice.

Blackstone says of it (Vol. IV, p. 321):

> A *certiorari* may be granted at the instance of either the prosecutor or the defendant; the former as a matter of right, the latter as a matter of discretion. * * *

It was always granted at the request of the king, in whose name the justice of the people was invoked.

And in *Groenvelt* v. *Burwell* (1 Ld. Raym., 454, 469) it is asserted that certiorari lies in all judicial proceedings in which a writ of error does not lie.

If these were attributes of the common-law writ of certiorari, the power to issue which was granted by the act of 1789, and there be any close analogy between the enforcement of the law by the people in the name of the "King" and its enforcement by the people in the name of the "United States," there would seem to be ancient authority in support of the proposition that the granting of the writ by this

court in the case at bar, and the part taken in these proceedings by the United States, are entirely in accord with the usages and principles of the common law—that is to say, with the "usages and principles of law" referred to in the act of 1789 (*supra*).

The case at bar is within the appellate jurisdiction of this court. Section 5 of the act of March 3, 1891, provides that such a case involving the construction or application of the Constitution of the United States may be brought here on appeal or writ of error.

(b) Certiorari under Act of March 3, 1891.

Prior to the creation of the circuit courts of appeal, and since 1879, a defendant in any criminal case against whom, as against this respondent, judgment had been entered upon a verdict of guilty in a district court, must, in case of a division of opinion, on error in the circuit court, have had the question of the validity of such judgment certified to this court, and the Government then had the benefit of an authoritative determination of the case by the highest court in the land.

It seems to be settled (*American Sugar Refining Co.* v. *New Orleans*, 181 U. S., 277, 282) that the act of March 3, 1891, sections 5 and 6, gives to a defendant in any case involving, as this does, the construction or application of the Constitution of the United States, the choice of suing out his writ either from this court or from the circuit court of appeals. As to the exercise of his choice, the

Government has nothing to say and is compelled to accept his election, and, if he chooses the circuit court of appeals, to present its argument in support of the judgment below to that court. The contention, therefore, that this court is without jurisdiction of the case at bar involves the assertion that a defendant may elect to take his case, though raising questions of gravity and of importance to the whole people—such, for example, as the constitutional question here raised—to a tribunal of inferior rank, the decisions of which as to these questions are, or may be, at variance with those of other courts in the country of the same rank, or even of this court itself, and that the Government must abide by the result, though erroneous.

It has been frequently stated in one form of language or another, and is perfectly clear, that the act of March 3, 1891, was designed, not to diminish the power and authority of this court, but to lighten its burdens. Congress obviously intended to give final jurisdiction in no case to the circuit courts of appeal, without the reservation of power in this court to exercise the jurisdiction which it is necessary for the enlightened and uniform administration of justice that it shall always possess, over all such matters as, in its discretion, it deems important.

The act evidently means, and this court has heretofore always proceeded upon that assumption, that it might stretch out its hand and take away from the final determination of any circuit court of appeals, at any stage, before or after decision

rendered in that court, any case involving questions of gravity and general importance, or as to which there is conflict between the decisions of state and federal courts, or between those of federal courts of different circuits, and indeed involving any matter of special interest to the people. (*Forsyth* v. *Hammond, supra*, at page 512, bottom; *Fields* v. *United States, supra*, at page 296, top; *American Construction Company* v. *Jacksonville, Tampa & Key West Railway Company, supra*, pages 383, 384, bottom.)

In fact, this court has so broadly, emphatically, and clearly construed those portions of section 6 of the act, which are quoted on the second page of this brief, that there would seem to be little room to doubt, upon the decisions, that it has the same right to review a criminal case on certiorari on the application of the Government that it has to review a civil case. In *Forsyth* v. *Hammond* (*supra*) Mr. Justice Brewer, speaking for the court, at page 511 *et seq.*, elaborately discusses the reasons for the creation of circuit courts of appeal and the reservation of jurisdiction in the Supreme Court, and says (pp. 512, 513, 514):

> Cases of a class in which finality of decision was given to the Circuit Courts of Appeal might involve questions of such public and national importance as to require that a consideration and determination thereof should be made by the supreme tribunal of the nation. It was obvious that all contingencies in which a decision by this tribunal was of importance could not be foreseen, and so there was placed

in the act creating the Courts of Appeal, in addition to other provisions for review by this court, this enactment:

"And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

The general language of this clause is noticeable. It applies to every case in which but for it the decision of the Circuit Court of Appeals would be absolutely final, and authorizes this court to bring before it for review and determination the case so pending in the Circuit Court of Appeals, and to exercise all the power and authority over it which this court would have in any case brought to it by appeal or writ of error. Unquestionably the generality of this provision was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this court a comprehensive and unlimited power. *The power thus given is not affected by the condition of the case as it exists in the Court of Appeals.* * * * *We reaffirm in this case the propositions* * * * *that the power of this court in certiorari extends to every case pending in the Circuit Courts of Appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that court.*

The court was then apparently considering *all* the cases as to which, by the terms of the act, judgments or decrees of circuit courts of appeal were made final, including criminal cases, and it is hardly to be supposed that they were not all in the mind of the court when the portion of the opinion above quoted was penned.

The distinction must be borne in mind that the paragraph from section 6, last quoted, is a reservation of authority already existing in the court, and not a grant of new or additional jurisdiction. The power of Congress, upon the establishment of an inferior, intermediary tribunal, not only to reserve authority in this court to review all important cases, criminal as well as civil, on certiorari, but even to give it jurisdiction to review criminal cases on the appeal or application of the Government by a writ of error or on certiorari, is beyond question. (*Taylor* v. *United States*, 207 U. S., 120, 127; *United States* v. *Bitty*, 208 U. S., 393, 399, 400; *United States* v. *Sanges*, 144 U. S., 310, 323.)

It was held in the *Sanges* case (*supra*) that section 5 of the act of March 3, 1891, which provides that appeals or writs of error may be taken from the district courts or from existing circuit courts direct to the Supreme Court in any case, among others, that involves the construction or application of the Constitution of the United States, was not sufficiently specific to give to the United States the right to sue out a writ of error to review a judgment of a circuit court sustaining a demurrer in a criminal case in which

that court held certain Federal statutes to be unconstitutional.

The case at bar, however, presents a different situation under a different provision of law. The proposition which the Government urges here is not that it has any right of appeal which this court is bound to recognize, but that this court is vested by law with authority, under the jurisdiction reserved to it by section 6 of the act, to order any case of which a circuit court of appeals has final jurisdiction to be brought here from such court on certiorari, and to determine it in the same manner as if it were here on appeal or writ of error; that is to say, just as if, and filling in what seem to be the obvious ellipses of the statute, "it has been carried by appeal or writ of error" *by the defendant, the only person who could so carry it there,* "to the Supreme Court," *instead of to a circuit court of appeals.*

The question raised, then, is not, as in the *Sanges* case, the *right* of the United States to have this case reviewed, upon the theory that error has been committed, but the *power* of this court to review the case, when called to its attention, upon the theory that an important question is involved such as Congress has reserved to it the right to consider and finally determine in all cases which are "made final in a circuit court of appeals." Stated a little differently and more concisely, this court, as has been suggested, may exercise its jurisdiction whenever it chooses by issuing its writ of certiorari to remove such case

out of a circuit court of appeals, and deal with it precisely as if no such tribunal were in existence and the case had been brought by the defendant directly to the Supreme Court from the trial court; otherwise it would be true that the authority of this court to exercise jurisdiction in the interests of the whole people in such a case as this, for the purpose of determining an important question such as that here raised, might be cut off by a convicted defendant's choice of the *forum inferiorem*.

The United States is before the court in no sense as an appellant alleging error and demanding the right to have that error corrected. As petitioner for the writ, it merely performs the function of calling the attention of the court to the importance of the case and to the questions raised. It is here in behalf of its citizens, suggesting to the court that this is a case of such a nature that, for the benefit of the entire country, it should be reviewed and authoritatively determined by the highest court of the nation.

It is only when this court, acting upon that suggestion, issues the writ, and assumes jurisdiction, that the United States has the same right and the same opportunity to urge here its contentions upon the merits of the case that it had in the Circuit Court of Appeals, and that it would have had here if the respondent had summoned it into this court to answer to his writ of error instead of into the Circuit Court of Appeals.

There are two methods provided by section 6 of the act under discussion, by means of which impor-

tant cases pending in a circuit court of appeals and as to which that court has final jurisdiction, may be brought to this court for review, *first*, upon the initiative of the circuit court of appeals itself through its certificate; and, *second*, by this court by means of its writ of certiorari upon a suggestion contained in a petition showing a proper case. In either event, the whole matter in issue is to be decided here in the same manner as if it had been carried up by writ of error or appeal. It can not, we think, be seriously contended that, because this is a criminal case, the circuit court of appeals would have no right to certify any question raised upon the record before it to this court, and that thereupon this court would have no power to require "the whole record and cause" to be sent up to it for its consideration and to decide the whole controversy. Had such certificate been made, the situation would have been different from that which is here presented only in respect to the method by which the case reached this court and in the fact that the Circuit Court of Appeals has rendered a decision. It may be fairly argued, we think, that the provision whereby the Supreme Court may issue its writ of certiorari for review was inserted in the statute because Congress did not propose to leave it wholly within the discretion of the circuit courts of appeal to determine whether a question before it was sufficiently doubtful and sufficiently important to be reviewed by the Supreme Court.

We believe that the foregoing considerations lead to the conclusion that the jurisdiction of this court to review on certiorari cases within the final jurisdiction of a circuit court of appeals, and pending in that court, is not limited to civil cases, criminal cases in which the writ is sought by the defendant, and cases sent here on certificate by a circuit court of appeals, but broadly extends to all cases which are of sufficient gravity and importance to make their decision by this court imperative or desirable, including a criminal case, like that at bar, determined by a circuit court of appeals in favor of the defendant, and called to the attention of this court through the instrumentality of a petition brought by the United States.

The difference between the contention of the Government in the Sanges case that, by section 5 of the Judiciary Act the United States was given the right to take a criminal case involving constitutional questions decided against it in the trial court on writ of error to this court, and to demand the opportunity to be heard here, and its contention now that by section 6 power was reserved in this court to bring up of its own motion, or upon the suggestion of the Government, and to review a case involving a constitutional question which the defendant has elected to take to the circuit court of appeals, is manifest, and the fact that such review might entail the same results as if it were an appeal by the United States from the decision of the circuit court of appeals, can be, we think, of no consequence.

There is, of course, no question of jeopardy raised. The validity of the respondent's trial is in issue upon his writ of error from the circuit court of appeals, and he is bound to accept all the legitimate consequences which may follow. (*Trono* v. *United States*, 199 U. S., 521, 534.)

II.

THE MERITS OF THE CASE.

It has already been stated (brief, p. 4) that the only questions upon the merits for argument in this court, naming them in the order of their importance, are: (*a*) The constitutional question raised by the motion in arrest of judgment (Rec., p. 39; Errors 53 and 54); and (*b*) the sufficiency of the indictment (Rec., pp. 2–28; Errors 1, 2, and 3).

(*a*) THE CONSTITUTIONAL QUESTION.

1. How raised?

More than two years after a verdict of guilty had been returned against him, and pending the allowance of a long and complicated bill of exceptions, over both the form and substance of which it is fair to assume, from the lapse of time, there was much controversy, this respondent, having employed new counsel, filed in the trial court a motion in arrest of judgment, claiming that the verdict against him was invalid by reason of the fact that it was returned by a jury composed, at the time it was rendered, of ten only. This claim was made notwithstanding his deliberate written consent, of record in the trial

court, that two of the jury originally impaneled be excused for substantial reasons appearing upon the record and already referred to, and his agreement, also in writing and of record, that the case thereupon proceed before the remaining jurors with the same force and effect as if the two jurors had not been excused.

Whatever views one may entertain with regard to such a claim made under such circumstances, when measured by the ordinary standards of good faith, honor, and decency, they ought, perhaps, to find no expression in this argument. A layman might be permitted to be indignant, but we must proceed unruffled to a discussion of the question as if no such considerations were involved.

The contention, then, of the respondent that the trial court erred in denying this motion, as already stated, in a slightly different form (brief, p. 4), is this:

If one indicted for a criminal offense punishable by a substantial term of imprisonment and designated a misdemeanor by the statute creating it, is put upon trial in a federal court and twelve duly qualified jurors are sworn to try the issue, and the tribunal to which he is entitled by law having thus been constituted, his trial proceeds before it, and thereafter, during the progress of the trial, two of the jurors are incapacitated, and the defendant requests, and in writing over his own signature consents, that the case proceed to a verdict by the remaining jurors, and a verdict of guilty is rendered, he may, nevertheless, escape the consequences of that verdict on the

ground that the jury which the Constitution (Article III) prescribes for the trial of "all crimes," while not denied him and completely constituted at the inception of his trial, had ceased, though by reason of his consent and at his own request, to be such a jury, when the verdict was announced, and that by logical deduction he has, therefore, never been tried at all.

2. Article III. The Sixth Amendment and the common law.

This contention must find support or refutation in the construction to be put upon Article III, section 2, paragraph 3, of the Constitution:

> The trial of all crimes, except in cases of impeachment, shall be by jury,

and upon this language in the Sixth Amendment:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury.

The important provisions just quoted have naturally been the subject of frequent and careful analysis by this court and by text-writers, but never, so far as the judges who rendered opinions in this case in the Circuit Court of Appeals, or counsel on either side, have been able to ascertain, by way of answer to the precise question which is presented here. In all that has been said, however, there can not fail to be much to illumine the path of one who is seeking the answer to that question. Much can be eliminated at the outset. It is not necessary, for example, for the Government to deny that

Article III of the Constitution demands that, despite any agreement of parties, the trial of every criminal case in the federal courts, except of that minor class mentioned in *Schick* v. *United States* (195 U. S., 65) and elsewhere, must, in order that jurisdiction may attach, be *begun* before a jury composed, as at common law, of twelve men; nor to discuss at length, or express an opinion upon, the propriety or legality of permitting one on trial for a *capital offense* to consent to a reduction in the number of jurors during his trial; nor even to suggest what would have been demanded in this respect in the case of a felony at common law. However interesting a pursuit of some of these inquiries might be, their discussion here would be purely academic, except so far, indeed, as it might help to throw light upon the solution of the question before us.

Putting it a little differently, we may admit, for the purposes of this argument, that Article III is not satisfied unless twelve duly qualified jurors are impaneled at the outset. That was done in this case. We may admit, also, *in favorem vitæ*, that under the tradition and custom of the common law it is imperative that the question of life or death be passed upon by a full panel, just as we should admit that there would be a mistrial of such a case at the common law if, *e. g.*, the jury were not kept impounded from impaneling to verdict. But this case is not capital. We may concede, further, though with a little more hesitation, that the rule as to such waiver was, for obvious reasons, probably the same at com-

mon law with regard to all crimes made felonies by the common law, as it is now in a capital case. But this is not a felony either at common law or by statute.

At this point we agree that if, in this twentieth century, in the United States, any reasonable distinction, based upon controlling grounds of public policy exists, or should be allowed to continue to exist, between a felony not capital and a grave misdemeanor, sufficient to justify a difference in respect to the application of the principle we are discussing to the one and the other, it is a very nice and arbitrary one.

With so much by the way of preface, we come now to consider the construction of the material language of Article III and its application to the question as it is raised here. What must the framers of the Constitution have meant by providing that "The trial of all crimes * * * shall be by jury?" is an inquiry which has been frequently made at the bar of this court. The only words requiring definition in this provision are "crimes" and "jury." That they must clearly be defined in the light of their common-law significance at the time the Constitution was adopted is elementary, and that they must be applied in view of the changes and developments which the last century has inevitably brought about in the practical administration of criminal justice in this country is, we believe, equally true. It is well settled that a jury at common law was a jury of twelve, and that it

is to such a jury that both Article III and the Sixth Amendment refer.

3. What is meant by "crime" at common law?

Definitions of "crime" have been many and various. Erskine, though perhaps not with perfect accuracy, defines the word as "an injury to society through a breach of some of its reciprocal relations." It was said by Chief Justice Taney, in *Kentucky* v. *Dennison* (24 How., 66, 99), that "The word 'crime' of itself includes *every offence, from the highest to the lowest* in the grade of offences, and includes what are called 'misdemeanors' as well as treason and felony." That this court does not now regard this last definition as wholly accurate is obvious. (*Callan* v. *Wilson*, 127 U. S., 540; *Natal* v. *Louisiana*, 139 U. S., 621; *Schick* v. *United States*, 195 U. S., 65.)

Blackstone says, "A crime or misdemeanor is an act committed, or omitted, in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms; though, in common usage, the word 'crime' is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler names of 'misdemeanors' only." (4 Bl. Com., p. 5.)

4. Felonies and misdemeanors at common law and to-day.

It has been repeatedly suggested, in argument and elsewhere during this controversy, that the answer to the question raised here as to waiver may depend upon the class of offenses to which that charged against this respondent belongs, whether felony or misdemeanor, and it is undoubtedly true that many state courts and writers upon constitutional and criminal law have made such a distinction or intimated that it exists. As to this, it is sufficient to say that while the legality of a waiver of this sort in respect to a felony has frequently been questioned and often denied, it has never been denied, we believe, where the charge was a misdemeanor. It will be interesting and profitable, perhaps, to consider for a moment how far any such distinction is tenable and can be reasonably applied in modern criminal procedure. At common law, a felony was an offense which occasioned a total forfeiture of either lands or goods, or both, to which capital or other punishment might be superadded, according to the degree of guilt. (1 Hale P. C., 411; *Bannon* v. *United States.*, 156 U. S., 464, 467.) A misdemeanor at common law was an indictable offense not amounting to a felony.

There can be no doubt that "crimes" as used in Article III included both felonies and misdemeanors as they were defined at common law in 1789, and that, in general, Article III contemplates, and the Sixth Amendment secures the right to, such a tribunal as under the common law of England was pro-

vided for the trial of crimes, subject, however, to such rules of procedure as were in force under the common law with respect to the trial of various classes of offenses, depending upon their gravity. We find, for example, as might have been expected, that the precautions taken in England from very early times, which still survive to some extent, at least, in this country, with regard to juries, for the protection of persons charged with crime, were greater in cases of some offenses than others. Such, for example, as the precaution of segregating a jury during the trial of a capital case, to which allusion has already been made.

In our American jurisprudence, apart from arbitrary statutory definition, the word "felony" has no distinctive, well-defined meaning. While it is still used, its significance is vague and indefinite. (*Mitchell* v. *State*, 42 Oh. St., 383, 386.)

As to felonies and misdemeanors, it may be said that though the nomenclature has survived, the distinction has been largely obliterated. Stephen in his "History of the Criminal Law of England" (Vol. II, p. 193) says: "So long as the punishment of death and the law relating to benefit of clergy were in force, the distinction between felony and misdemeanour was not only an important but might almost be described as an essential part of the law, but since the substitution of milder punishments for death, the distinction has become unmeaning and a source of confusion, especially as many offences have been made misdemeanours by statutes, which render

the offender liable to punishment as severe as those which are now usually inflicted upon persons convicted of felony." And the same writer (Vol. I, p. 487) says that "Death was at common law the punishment of all felonies except petty larceny and mayhem." This was true in 1789. Since then, however, common-law felonies have become reduced to the few crimes still punishable by death, so that, for practical purposes, offenses against the United States, at least with respect to their gravity as indicated by the punishment attached, may be divided, to-day, into three classes: (1) Capital crimes (treason, murder, rape); (2) crimes not capital; and (3) violations of police regulations.

As to the last named, it is settled that the Constitution does not guarantee the right to a jury trial; as to the first, no one will deny that there are reasons not existing in other cases which make it humane and proper to surround one on trial for his life with every safeguard that can be devised consistently with an effective administration of criminal justice; and, accordingly, as has already been suggested, many requirements are insisted upon in the conduct of such a trial which are not regarded as essential in others. It is, then, as to the *second class* of offenses, comprising both those which are termed "felonies" and those which are termed "misdemeanors" in the various statutes creating them, that our question remains unanswered, or not fully answered, by the authorities; and this court is now called upon to assert specifically whether *a waiver*

under the circumstances at bar is permitted by the Constitution in none of the cases comprised in the second class, in all such cases, or only in those which Congress has seen fit to term "misdemeanors."

5. Cases in which waiver of a full jury or reduction by consent during trial have been considered.

The cases in which the question to be determined here, or a similar question, has arisen under the varying language of state constitutions[a] and statutes are, as has been suggested, conflicting. Without citing them all, it is, perhaps, enough to say that there are four types illustrated by (1) *Cancemi* v. *People* (18 N. Y., 128), *a capital case* decided in 1858 by the Court of Appeals of the State of New York, in which one of the jurors was withdrawn from the panel by consent, after the beginning of the trial, and the court held, upon a verdict of guilty, that the consent of the prisoner to such verdict by less than a full jury of twelve was a nullity and the conviction illegal; (2) *State* v. *Ellis* (22 Wash., 129), *an information for robbery*, decided in 1900, in which, by consent of the defendant in writing, a full panel was reduced to eleven, during the trial, because of the illness of a juror, and the court held the verdict void; (3) *State* v. *Kaufman* (51 Iowa, 578), *an indictment for forgery*, decided in 1879, in which, under circumstances similar to those in the *Cancemi* case, except that the case was not capital, the contrary was held; and (4) *Commonwealth* v.

[a] See Appendix *post*.

Dailey (12 Cush., 80), *a misdemeanor*, decided in 1853, in which Chief Justice Shaw, speaking for the Supreme Judicial Court of Massachusetts, held that such waiver did not invalidate the verdict. It is noteworthy that the court in *Cancemi* v. *People* (*supra*) does not discuss or cite *Commonwealth* v. *Dailey*, nor is any mention of it made in *State* v. *Ellis*. In the latter case, although the situation, except for the fact that the offense charged was a common-law and statutory felony, and one juror only was withdrawn from the panel, was the same as the case at bar, the attention of the court was apparently not called to the distinction between a trial begun before a full panel which is afterwards diminished by consent, and one begun by agreement before less than a full panel. This is made clear by the reasoning of the court near the end of the opinion (p. 134): "If they (the State and the defendant) could refer it to a tribunal consisting of eleven men, they might with equal authority refer it to a referee selected by themselves independent of the statute." The court entirely overlooks the argument that a tribunal for the trial of crimes is not complete and that jurisdiction does not attach unless a jury of twelve is impaneled, and that, when such a jury is impaneled, jurisdiction is complete. Seevers, J., in *State* v. *Kaufman* (*supra*), had both the *Cancemi* case and the *Dailey* case before him and discusses the question raised here, apart, of course, from its aspect under the Federal Constitution, with great care and ability.

More or less in line with the doctrine of *Commonwealth* v. *Dailey*, and to be read in this connection, are: *Opinions of Justices* (41 N. H., 552); *State* v. *Almy* (67 N. H., 274, 280); *State* v. *Worden* (46 Conn., 349, 368); *Lavery* v. *Commonwealth* (101 Pa. St., 560); *Craig* v. *State* (49 Oh. St., 415, 416, 419); *State* v. *Sackett* (39 Minn., 69); *State* v. *Woodling* (53 Minn., 142); *Edwards* v. *State* (45 N. J., L. 419); *Murphy* v. *State* (97 Ind., 579); *Moore* v. *State* (52 S. E. Rep., 81). Of these cases the *Dailey*, *Lavery*, *Sackett*, *Woodling*, and *Moore* were misdemeanors; the others were felonies.

To the same effect, also, as *Commonwealth* v. *Dailey*, and quoting it with approval, is *United States* v. *Shaw* (59 Fed., 110, 114). See also *West* v. *Gammon* (C. C. A. Sixth Circuit, 98 Fed., 426), in which Day, J., speaking for a unanimous court, says, at page 429: "It was the purpose of the Constitution to preserve to the accused the right, not the necessity, of a trial by jury."

6. Supreme Court cases considered.

With regard to the relation between Article III and the Sixth Amendment, this court in *Callan* v. *Wilson* (127 U. S., 540, 549) has said that there is no necessary conflict between them; and, in *Schick* v. *United States* (195 U. S., 65, 68, bottom) that "If there be any conflict between these two provisions the one found in the amendment must control, under the well-settled rule that the last expression of the will of the lawmaker prevails over an earlier one."

The *Schick* case construes the word "crimes" in Article III, and "criminal offenses" in the Sixth Amendment, as not including petty offenses, and holds that as to such petty offenses a jury in the District of Columbia may be waived altogether. In the course of the opinion by Mr. Justice Brewer, *Commonwealth* v. *Dailey* (*supra*), *State* v. *Kaufman* (*supra*), and *State* v. *Worden* (*supra*), are cited with approval, and the opinion of Chief Justice Shaw in the *Dailey* case is quoted from at some length.

In *Thompson* v. *Utah* (170 U. S., 343)—an authority largely relied upon by this respondent—the court, by Mr. Justice Harlan, says, at page 351, that it was Thompson's "*constitutional right to demand* that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons;" and again, at page 353, that "It is sufficient to say that it is not in the power of one accused of *felony*, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force, when this crime was committed, did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons." In that case, the trial began before a jury of eight, as provided by the law of the State of Utah, and the defendant allowed it to proceed to a verdict against him without objecting on that account, and is authority only for the proposition, which is not denied in the case at bar, that no agreement, express or implied, *can confer*

jurisdiction under the Federal laws, upon a tribunal composed at the outset of a judge and less than twelve jurors.

In *Maxwell* v. *Dow* (176 U. S., 581) the court, at page 603 (Mr. Justice Harlan dissenting), holds that "trial by jury has never been affirmed to be a necessary requisite of due process of law;" and in *Hawaii* v. *Mankichi* (190 U. S., 197) that the right to a trial by jury is not fundamental in its nature, but concerns merely a method of procedure (p. 218). The same thing is suggested in *Dorr* v. *United States* (195 U. S., 138, 148).

In *Queenan* v. *Oklahoma* (190 U. S., 548), which was an indictment for murder, it transpired during the course of the trial that one of the jurors was disqualified from serving by reason of a conviction for felony. Upon this fact being made known, counsel for the prisoner were asked what they desired to do, and replied that they had nothing to say. Whereupon the trial proceeded to a verdict of guilty. Thereafter the defendant undertook to avoid the verdict by setting up that he had been deprived of a constitutional right which he could not waive. The court (pp. 551, 552), by Mr. Justice Holmes, says, "The contrary plainly is the law as well for the Territories as for the States * * * The prisoner had no right to complain * * * It was his duty to object at the time if he was going to object at all. He could not speculate on the chances of getting a verdict and then set up that he had not waived his rights." It is to be observed that this

was a capital case, and that, though the jury consisted of twelve men, one of them was, with respect to jury duty, *civiliter mortuus*, so that the verdict was returned by a panel, eleven only of whom could be legally counted as jurors. In this connection, see *The Queen* v. *Sullivan*, 1 P. & D., 96, and *King* v. *Sutton*, 8 B. & C., 417.

If, then, recapitulating these propositions from the decisions of this court last cited, it is true that—

(1) Trial by jury is not a necessary requisite of due process of law; and if,

(2) The right to such trial is not fundamental, but concerns merely a method of procedure; and if,

(3) Article III is to be applied in the light of the Sixth Amendment as the last expression of the will of the lawmakers; and if,

(4) In a capital case, a defendant may, by acquiescence, consent that his trial proceed before a jury, eleven only of whom are legally qualified to serve as jurors; and if, further,

(5) The authority of *Thompson* v. *Utah* is properly to be restricted to the trial of felonies and held to decide, as to these, only that under the Constitution of the United States they can not be *begun*, by agreement, express or implied, with less than a common-law jury; and if, moreover, it is true that,—

(6) While Article III is the prescription of a jury trial in criminal cases as it existed at common law at

the time of the adoption of the Constitution, the Sixth Amendment, on the other hand, is *cuilibet jus pro se introductum*, and gives to a person charged with crime the right to insist upon such a trial as is prescribed by Article III,—

We feel justified in asking this court to say that the right to a trial by jury secured to this respondent by the Sixth Amendment was not denied him; that jurisdiction of the offense charged against him was duly acquired by the tribunal prescribed by Article III, namely, a tribunal constituted of a judge and a common-law jury; that the provisions of Article III and the Sixth Amendment were therefore fully complied with; that a jury trial having been granted him and jurisdiction having once attached, it could not be divested, and that it was thereafter, during the progress of this trial, competent for him to consent, if he believed it for his interests, that the panel be diminished by two, and to agree to accept a verdict of ten as of the same force and effect as a verdict of twelve; and that if it is possible to-day to make any rational distinction in the rule of law in this respect between a felony and a misdemeanor, and the court feels bound by the dictum quoted *supra* in *Thompson* v. *Utah*, there is at least no authority or ground for withholding the application of the doctrine of permissible waiver from offenses which are by statute denominated misdemeanors.

7. As consent can not endow a tribunal with jurisdiction, so it can not divest it of jurisdiction that has once attached.

The respondent's argument in the Court of Appeals was an elaborate and convincing demonstration of a proposition upon which there is not the shadow of controversy between us, namely, that no agreement of parties can *confer jurisdiction* in violation of the peremptory mandate of Article III; that is to say, upon a tribunal consisting of a judge and less than twelve jurors. That this proposition is a correct statement of the law we do not dispute. We believe, however, that it is equally true, that when jurisdiction has once attached, when the tribunal prescribed by Article III has once been constituted, as in the case at bar, the defendant's agreement, whether honestly or perfidiously accorded, that one of the jurors be discharged can not operate to divest or impair that jurisdiction.

The death, or other disability, of a juror can not, we think, affect jurisdiction, once acquired. It merely creates a situation in which the defendant on trial may invoke the Sixth Amendment, if he chooses. If he does not choose to invoke it, the court may proceed with undiminished jurisdiction, with a jury which has suffered "a fractional loss," to determine the case.

There are two essential incidents of a criminal trial that the accused can not waive—one is *jurisdiction* and the other *due process of law*.

In *Ex parte Bain* (121 U. S., 1), relied upon by the respondent, no jurisdiction over the trial ever attached, because the indictment upon which the accused entered his plea of not guilty, and upon which he put himself upon the country for trial, was not the indictment of a grand jury. His agreement that it might pass as such could not confer jurisdiction upon the court, and his conviction was held illegal.

So, too, in *Crain* v. *United States* (162 U. S., 625), also cited by the respondent, there was no jurisdiction because no arraignment and no plea. The accused had never been put upon trial.

In *Thompson* v. *Utah*, *supra*, jurisdiction never attached because the trial began with a jury of eight.

In *Hopt* v. *Utah* (110 U. S., 574) the absence of the accused during the progress of the trial was said to be a violation of due process of law, and the trial was, therefore, held void. But in *Maxwell* v. *Dow*, cited *supra* and elsewhere, this court has held that trial by jury has never been affirmed to be a necessary requisite of due process of law. So that the verdict in the case at bar can not be attacked—and, indeed, is not attacked—on that ground.

In contemplation of law, jurisdiction once attached endures to the end, and a convicted defendant can attack a verdict against him only upon the grounds that the tribunal by which he was tried never acquired jurisdiction (as in *Thompson* v. *Utah*), or, that the trial was lacking in some necessary element of due process of law (as in *Hopt* v. *Utah*). Neither one of

these grounds exists in the case at bar. Complete jurisdiction was obtained, and the diminution of the panel by two took from the trial nothing of that due process of law essential to make it a trial in accordance with the provisions of the Constitution of the United States.

In other words, so far as Article III and the Sixth Amendment are concerned, the following situations with respect to a jury trial may arise:

(1) An attempt to compel one accused of crime to go to trial before a jury consisting of less than twelve, without his assent and against his objection. Such trial would be doubly void, in the first place, because the tribunal by which he was tried would not be the tribunal peremptorily prescribed by Article III; and, in the second place, because his demand for such a tribunal, as of right under the Sixth Amendment, had been ignored. This was not the situation in the case at bar.

(2) The putting of one accused of crime on trial before a jury of less than twelve, with his consent, express or implied. Such trial, it is conceded, would be void under Article III for lack of jurisdiction in the tribunal, which could not be supplied by consent. This, also, was not the situation in the case at bar.

(3) The putting of one so accused on trial before a tribunal conforming in all respects with the mandate of Article III, and thereby clothed with jurisdiction to try the case. Thus far, this *was*, admittedly, the situation in the case at bar.

In the course of such trial, so begun, however, and upon the death or disability of one or more of the jurors, two different contingencies with respect to the integrity of the panel may arise: *First*, a refusal on the part of the defendant to proceed with less than twelve, involving a demand for the discharge of the jury and a new trial. Such demand must be acceded to, not, however, upon the ground that jurisdiction once acquired has been destroyed or impaired by the death or illness of the jurors, but because the Sixth Amendment gives the defendant the right to insist, if he chooses, upon a verdict of twelve men. Or, *second*, a consent on the part of the defendant, express or implied, to continue the trial with a less number. In this event, the jurisdiction is still there, and, as we have said, can not be destroyed or impaired. His consent operates, and can operate, only to the extent of waiving the provisions in his favor contained in the Sixth Amendment. And thus the peremptory mandate of Article III, having been complied with, and the objection of no jurisdiction having been avoided, we have reached at last the point in the trial where the only provision of law affecting a reduction of the jury is the *lex pro se introducta*, the Sixth Amendment, and the operation of the hackneyed maxim, *volenti non fit injuria*.

In other words, more concisely put, we agree with the respondent—and he need hardly have been at such pains in arguing—that the trial of a "crime" in the federal courts which is begun before a jury of less than twelve is a nullity for lack of jurisdiction;

that no consent of parties, though approved by the judge, can confer such jurisdiction.

We deny, however, that jurisdiction once obtained can be divested as a result of the agreement or acts of the parties.

We admit that, jurisdiction having attached, as in the case at bar, the defendant, upon the diminution of the panel by the illness of a juror, then had the right, which no power could gainsay, given him by the Sixth Amendment, to insist upon the discharge of the entire panel and upon a new trial.

We contend that it was within his power not to so insist, if he chose, and to consent to go on and to take the verdict of eleven or ten as of the same force and effect as that of twelve. The *second* contingency above stated was the precise situation in the case at bar.

Every constitutional provision necessary to invest jurisdiction was complied with; nothing was denied to the respondent upon which he had a right to insist; a verdict was rendered by ten men by whose determination of the issue between him and the United States this respondent, having been given an opportunity to invoke the Sixth Amendment, and explicitly declining to do so, had deliberately agreed to abide.

The whole question turns, or may turn, it seems to us, on whether there can be a destruction or impairment of jurisdiction once acquired under such circumstances as these—whether in contemplation of law, it is true that the jury of twelve, required by the Constitution and impaneled in this case, remained a

constitutional jury to the end, though suffering a "fractional loss," with the defendant's consent. (*Interstate Consolidated Street Railway Co.* v. *Com. of Massachusetts*, 207 U. S., 79, 87.)

In short, the specific contention of the Government, upon this branch of the case, and the proposition which it has undertaken to maintain, is that *it is not obnoxious to the Constitution nor to any principles of public policy or sound reason, nor to the enlightened administration of justice, nor is it violative of any natural right of a person accused of crime, to hold it to be law in the United States that a valid judgment may be entered upon a verdict of guilty of an offense of the kind charged in this indictment, where the right to a trial by a jury of twelve is not denied the accused, and such a jury is actually impaneled, and thereafter the accused, by deliberate waiver, consents that two of the twelve jurors be excused, and solemnly declares that he is content to accept, and will accept, the verdict of the ten remaining jurors as of the same force and effect as that of a jury of twelve.*

(b) THE SUFFICIENCY OF THE INDICTMENT.

By assignments of error 1, 2, and 3 (Rec., pp. 150, 151, 152) the claim is made by this respondent that the indictment (Rec., pp. 2–28) does not, with clearness and with that reasonable certainty required by law, set forth the offense or offenses with which he was charged, and that the district court erred in overruling the demurrers filed by him.

An indictment is sufficient if it sets forth clearly the necessary data and essential elements of the offense intended to be charged with such particularity and substantial accuracy that the court can determine whether, on its face, the indictment discloses a crime; if the accused is reasonably informed of the charge which he is called upon to meet; and if the record shows to what extent he may plead a conviction or acquittal in bar to any subsequent prosecution for the same offense.

The tendency of legislatures, courts, and pleaders of the present day is to simplify criminal pleadings as far as is consistent with the provisions of the Constitution sensibly construed. Such tendency is illustrated by United States Revised Statutes, section 1025, and by the forms prescribed or permitted by statute in Massachusetts (Rev. Laws (Mass.), chap. 218, secs. 34, 67). This is upon the principle, in part, at least, that the Constitution should be invoked as a protection to the innocent, not as a sanctuary of refuge for the guilty.

The offenses charged in this indictment are misdemeanors (R. S., 5209), and the test of the sufficiency of the indictment must be controlled by the rules applicable to misdemeanors, and not to felonies, so far as they differ. (*Jewett* v. *United States*, 100 Fed., 832, 840; *United States* v. *Britton*, 107 U. S., 655, 661, 665.)

The main argument in support of the alleged insufficiency of the indictment in this case is that a

charge, under Revised Statutes, 5209, of "willfully misapplying" the money, funds, or credits of a national banking association, must be supplemented by further averments showing how the misapplication was made, and that it was an unlawful one (*Batchelor* v. *United States*, 156 U. S., 426), and this, of course, must be admitted. The question at issue here is whether or not the indictment does sufficiently show how the alleged willful misapplication was made, and that it was an unlawful one.

The first case which naturally suggests itself in support of the indictment is that of *Jewett* v. *United States* (*supra*), decided by the Circuit Court of Appeals for the First Circuit on March 29, 1900. In that case the pleader charged in the indictment a misapplication by the defendant as agent of the Lake National Bank of Wolfboro of certain "assets of the association, consisting of certain credits, certain money, divers promissory notes, divers certificates of deposit, divers gold coins, and divers silver coins, of all of which a more particular description was alleged to be to the jurors unknown" (p. 834). The opinion of the court does not set forth the exact language of the indictment, but the fact is that the language of count 84 of the indictment referred to charged that certain moneys, etc., said Jewett "did secretly and by some means and in some manner to the jurors unknown unlawfully, fraudulently, and willfully misapply and convert to his, said Jewett's, own use, with intent then and thereby to injure and defraud the Lake

National Bank of Wolfboro and divers of its shareholders, a more particular description of whom is to the jurors unknown."

In the indictment in the present case the charge was, in each of the three counts upon which Dickinson was found guilty, namely, the *first, third,* and *fifteenth counts* of the indictment, in substance that Foster, cashier of the South Danvers National Bank, certain credits, etc., of the bank did—

"Wilfully misapply by then and there unlawfully, fraudulently, knowingly, wilfully, and designedly, without the knowledge and without the consent of said The South Danvers National Bank, converting said money, funds, credit and credits, and each thereof to the use, benefit and advantage of one John W. Dickinson, of Newton, in said District of Massachusetts, thereby depriving said The South Danvers National Bank of the same, and of the use and benefit thereof, with intent of him, said George M. Foster, such cashier as aforesaid, then and thereby to injure and defraud said The South Danvers National Bank."

Then follows an allegation in substance that said Foster as cashier, in the manner and form aforesaid, unlawfully, fraudulently, knowingly, wilfully, and designedly did wilfully misapply and convert said money, funds, and credits to the use, benefit, and advantage of said Dickinson, and deprive the bank of the same, and of the use and benefit thereof, with intent of said Foster then and thereby to injure and defraud the bank. The indictment then proceeds to allege that Dickinson, on the day alleged

in the preceding part of the count, well knowing the premises, and well knowing that said Foster was then cashier of the bank, "did unlawfully, fraudulently, knowingly, wilfully, and designedly incite, move, procure, counsel, hire, command, aid and abet the said Foster, such cashier, to commit the offense and crime of wilfully misapplying said money, funds, and credits of the bank, in manner and form and with the intent aforesaid, with the intent of said Dickinson then and thereby to injure and defraud the bank."

Reducing the charge of the indictment to its simplest terms, it is that Foster as cashier wilfully misapplied the money, funds, and credits of the bank by fraudulently converting them to the use and benefit of Dickinson, with intent to injure and defraud the bank, and that Dickinson, with the same intent to injure and defraud the bank, unlawfully, fraudulently, and wilfully incited, aided, and abetted Foster in misapplying the funds of the bank by converting them to Dickinson's use and benefit, with intent to injure and defraud the bank.

In this indictment there is no allegation that the manner whereby the funds of the bank were misapplied was unknown to the grand jurors. On the contrary, the manner in which the misapplication was made is shown, namely, by conversion of the funds of the bank to the use of another person who had no right to them, fraudulently and with intent to injure the bank.

The defendant will doubtless rely, as he did in the Court of Appeals, in arguing the insufficiency of the indictment, upon *Batchelor* v. *United States* (*supra*), which holds that inasmuch as the words "wilfully misapplies" have no settled technical meaning, and do not of themselves fully and clearly set forth every element to constitute the offense intended to be punished, they must be supplemented by further averments showing how the misapplication was made, and that it was an unlawful one, because without such averments there is no sufficient description of the exact offense with which the defendant is charged, so as to enable him to defend himself against it, or to plead an acquittal or conviction in bar of a future prosecution for the same cause (p. 429). That indictment, however, was so confused, uncertain, and ambiguous, as the court says, at page 431, that neither the accused nor the court could be called upon to pick out and put together from its allegations enough to make out a sufficient charge of unlawfully misapplying funds of the banking association. The judgment in that case was reversed, because the whole indictment was hopelessly mixed, confused, and unintelligible, and if the court could have understood what the pleader intended, it would still be left in doubt whether the allegations showed that the manner in which the bank's funds were misapplied was an unlawful one.

On the other hand, in *Coffin* v. *United States* (156 U. S., 432), it was held that an indictment charging that one Haughey, as president of the Indianapolis

National Bank, did unlawfully, feloniously, and willfully misapply the moneys, funds, and credits of said association, which were then and there under his control, with intent to convert the same to the use of the Indianapolis Cabinet Company, by causing the sum of $6,318 to be paid to said company upon a check drawn by said company upon the bank, which the company was not entitled to draw from the bank because it had no funds in the bank to its credit, and was then, as Haughey knew, insolvent, all of said acts being done with intent to injure and defraud the bank, and further alleging that Coffin and others unlawfully, willfully, knowingly, and feloniously, and with intent to defraud the bank, did aid and abet Haughey, as aforesaid, to wrongfully, unlawfully, feloniously, and willfully misapply said sum of money, sufficiently set forth a violation of Revised Statutes 5209.

In *Evans* v. *United States* (153 U. S., 584) the defendant was charged with fraudulently aiding and abetting the cashier of a national bank to misapply certain moneys, funds, and credits of the bank, with intent to injure and defraud the bank, by fraudulently surrendering to the defendant a note previously discounted by the bank and overdue and unpaid, which was held as a part of the funds and credits of the bank, without receiving the face of the note therefor or any part thereof. The court said (p. 590): "Every element of the offence being set forth in the earlier part of the count, there was no necessity of repeating it when the particular credit misapplied

is described, nor of negativing every possible theory consistent with an innocent delivery of the note to the defendant. * * * The general words of a fraudulent misapplication to the use and benefit of the defendant, and of an intent by so doing to defraud the bank, are of themselves inconsistent with an honest purpose. Indeed, the word 'surrender' carries with it something more than a bare delivery and indicates a transfer of title as well as of possession."

In the present case it will be noted that the preamble to the indictment charges that the South Danvers National Bank had, before and at the time of the commission of the offense thereafter charged—

"An account and credit with the Suffolk National Bank of Boston, a national banking association, * * * and did, from time to time at, before and after the commission of said offence, make deposits of moneys, funds, and credits to the credit of its said account with said The Suffolk National Bank of Boston, and did at all said times charge its said account for moneys, funds, and credits paid and applied by said The Suffolk National Bank of Boston for the use and purposes of said The South Danvers National Bank; that on the day and at the time of the commission of said offence one George M. Foster was cashier of said The South Danvers National Bank, and as such cashier did assist said The South Danvers National Bank in the transaction of its said banking business."

In the second paragraph of the indictment, which has already been set forth in part, one of the credits alleged to have been fraudulently converted to the use of Dickinson was "said credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of $3,537.92," and "certain credits of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of $3,537.92," and "a certain credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value of $3,537.92, a more particular description of said moneys, funds, credit and credits being to said jurors unknown."

It would seem that the conversion with fraudulent intent to the use of a third person of a credit or deposit of one national bank in the hands of another, the dishonest purpose of the bank officer and of such third person being clearly set forth, was as effectually a violation of Revised Statutes 5209, as surrender and delivery of a note belonging to the bank by the cashier to a third person as in the *Evans* case.

Fraudulent conversion of the bank's property to the use of another certainly carries with it as much a transfer of title as the word "surrender" was held to do in the *Evans* case.

It is not necessary that the words "convert to the use of another" should have a well-understood technical meaning, because it is requisite only that the

manner or mode of misapplication of the moneys of the bank should appear to be unlawful, and done with intent to injure and defraud the bank. Applying the *Evans* case, if the bank received value for the funds converted to the use of Dickinson, it was clearly a matter of defense. So if at the time of the conversion the bank received security as a part of the same transaction, this would undoubtedly be a defense.

It is not necessary, either in criminal or civil pleading, to anticipate or negative a defense. If the defendant Dickinson did not receive the money alleged to have been converted to his use by Foster, or if he received it for an honest and legitimate purpose, those facts were open to him in defense of the indictment.

The allegation that a more particular description of the money, funds, and credits alleged to have been willfully misapplied was unknown to the grand jurors is sufficient. "The true rule is that where nothing appears to the contrary, the verity of the averment of want of knowledge in the grand jury is presumed." (*Coffin* v. *United States, supra,* p. 451.)

The manner in which the alleged unlawful procurement by Dickinson was effected was not necessary to be set forth (*Coffin* v. *United States, supra,* p. 448); and it is sufficiently alleged that at the time of such procurement Dickinson knew that Foster was cashier of the bank. (Ibid, p. 449.)

It is submitted that the court has authority to issue the writ of certiorari, and that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the Circuit Court affirmed.

CHARLES J. BONAPARTE,
Attorney-General.

HENRY M. HOYT,
Solicitor-General.

ASA P. FRENCH,
United States Attorney.

APPENDIX.

Constitutional provisions of Massachusetts, New York, Iowa, and Washington, with regard to jury trial in criminal cases.

Massachusetts, Part I, Art. XII (~~*ante*, pp. 31, 32~~):

"No subject shall be . . . deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury."

New York, Art. I, sec. 2:

"The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever."

Iowa, Art. I, pars. 9 and 10:

(9) "The right of trial by jury shall remain inviolate."

(10) "In all criminal prosecutions . . . the accused shall have a right to a speedy and public trial by an impartial jury."

Washington, Art. I, secs. 21 and 22:

(21) (Same as Iowa, (9) *supra*.)

(22) "In criminal prosecutions the accused shall have the right to . . . have a speedy and public trial by an impartial jury."

O

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PETITIONER,
v.
JOHN W. DICKINSON.
No. 362.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON THE QUESTION OF JURISDICTION.

ARGUMENT.

A verdict of guilty was found against this respondent in the District Court for the District of Massachusetts upon an indictment under the national-bank act. He moved in arrest of judgment. The motion raised a constitutional question. It was overruled. He thereupon carried the question, with others relating to pleading and evidence, on error, to the Circuit Court of Appeals. That court took jurisdiction, and, by a divided opinion, determined the constitutional question in his favor and all the others against him, and sent the case back for a new trial.

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The constitutional question involves a most important principle of criminal jurisprudence, and is momentous enough to make it extremely desirable, in the interests of the whole people, that it shall be settled, one way or the other, by this court.

The Government, it is conceded, can not have it reviewed as of *right*. It has, however, obtained a stay of mandate in the Court of Appeals, and has directed your Honors' attention to the question, to the end that, if you should deem it of sufficient importance, you might, of your own motion, exercise that discretionary power which seems to have been vested in you by Congress, to take the whole case out of the Court of Appeals, supersede the jurisdiction of that court, and decide it *de novo*, as if—to use the language of Congress and apply it as it has been applied by this court—it had been brought directly here by the defendant from the District Court. (Sec. 6, Jud. Act, 1891; *The Three Friends*, 166 U. S., 1, 49.)

Your Honors have awarded the writ, and the record is in this court.

I.

Where the language of a statute is explicitly inclusive, as in section 6 of the judiciary act of 1891, exceptions are not to be read into it unless the context clearly demands it to avoid an obvious absurdity or anomaly. This is particularly true of a remedial statute such as this.

II.

The precise question, carefully worded, which this court asked itself in the *Sanges* case, and which only it proceeded to answer, was: Did section 5 of the judiciary act of 1891 confer "upon the United States *the right to sue out a writ of error* in a criminal case?" (p. 311). The emphatic denial, and the only denial, of that case is that the statute gave the United States, as was claimed by the Government, the *right* to bring up a criminal case on writ of error. And this denial is based largely, if not wholly, upon the ground that any other construction would involve a "serious and far-reaching innovation" in the criminal jurisprudence of the United States (p. 323). That is to say, the inference from the language of the court is strong that if there had been exhibited, prior to that decision, any intention on the part of Congress to give to the United States a right of appeal in criminal cases, the court would have construed the statute differently.

The innovation suggested has now, however, been accomplished, and the power of Congress to make it has been sanctioned by this court. (Act of March 2, 1907, 34 Stat., 1246; *Taylor* v. *United States*, 207 U. S., 120, 127; *United States* v. *Bitty*, 208 U. S., 393, 399, 400.) It can no longer be said that a right of appeal in the Government, such as was claimed in the *Sanges* case under section 5, is an idea foreign to the criminal jurisprudence of the United States.

The most that could now be said would be that when the section was drawn, seventeen years ago, *it would have been* a "serious and far-reaching innovation" to give the United States such a right of review, and that it could not then have been assumed to be conferred by implication.

III.

Section 6 of the Court of Appeals act, however, does not involve the same, or a similar, question of statutory construction as that in the *Sanges* case, and to give it literal effect, without reading into it any exception, will not only be the recognition of a power which Congress admittedly possesses, but, we respectfully submit, will not be obnoxious to any principle of the common law or of American jurisprudence.

IV.

The United States, as we have elsewhere urged (original brief, p. 21), is here in no sense demanding review as its right. It is not here even alleging error, certainly not in terms, and, we submit, not in effect. It has merely called the court's attention to a case in which a question of great public importance is raised, and has suggested that, under the powers conferred upon, or reserved in, this court by section 6 of the Court of Appeals act, and in the interests of a uniform and enlightened administration of justice, there should be, if possi-

ble, an authoritative determination of that question, one way or the other, by the only court whose decisions are regarded as controlling precedents in all other courts of the United States.

V.

The *writ of error* is a weapon which the law places within the reach of all persons, and which the legislature may give to the State in a criminal proceeding, to be used at will, whenever appropriate, in the protection or enforcement of rights.

Certiorari, on the other hand, is an instrument entrusted only to the impartial custody and control of a court, to be resorted to by it in its discretion whenever appropriate and necessary to the accomplishment of justice.

VI.

Though the writ of certiorari is not mentioned by name in the Constitution and statutes of the United States prior to the judiciary act of March 3, 1891, the original power to issue the writ was conferred upon this court by the First Congress (Act 1789, c. 20, sec. 14; 1 Stat. 81, which now appears in substance in Revised Statutes, sec. 716). This section gave to the Supreme, Circuit, and District courts "power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

The writ of certiorari, therefore, under our Constitution and statutes is strictly the common-law writ of that name, with all its functions and attributes so far as applicable to our system of jurisprudence. It is defined at common law to be an original writ issuing out of the Court of Chancery or the King's Bench, and directed in the king's name to the judges or officers of inferior courts, commanding them to certify or to return the records of a case pending before them, to the end the party may have a more sure and speedy justice. An examination and comparison of the authorities and the text writers, both English and American, seems to justify the conclusion that the writ, as invoked in this country, has all the attributes and functions which it possessed in England, except, of course, that it is not here, as it was there, a royal prerogative writ (*Ex parte Vallandigham*, 1 Wall., 243, 249).

Nevertheless, having said that this is the writ of certiorari known to the First Congress, and therefore the common-law writ, we may point with some emphasis to the fact that whereas there is little authority showing that the king could have a writ of error in a criminal case (*United States* v. *Sanges*, 144 U. S., 310, 312) there is, on the other hand, no doubt whatever that the writ of certiorari was an instrument constantly used in England in the administration of the criminal law at the instance of the prosecutor, and apparently not alone, because it was the "prerogative of the king."

Blackstone uses the word "prosecutor" and not "king" in this connection, saying (Vol. IV, p. 321): "A *certiorari* may be granted at the instance of either the prosecutor or the defendant; the former as a matter of right, the latter as a matter of discretion." In other words, the use of certiorari, at the instance of the state, in the enforcement of the criminal law, was not only not foreign to the law of England in 1789, but was one of its normal, and almost essential, incidents.

Among its other attributes, as stated in *Groenvelt* v. *Burwell* (1 Ld. Raym., 464, 469, cited in our original brief), it lies in all judicial proceedings in which a writ of error does not lie. And, in the case at bar, a writ of error does not lie at the suit of the United States or of the defendant, from this court to the Court of Appeals. In the case last cited, it is further said that "It is a consequence of all jurisdictions to have their proceedings returnable here (to the Court of King's Bench) by certiorari, to be examined here * * *. Where any court is erected by statute, a certiorari lies to it" (p. 469).

The analogy between the powers of this court and those of the Court of King's Bench, as it existed prior to 1789, was earliest and most fully drawn by Chief Justice Marshall in *ex parte Crane*, *Pet'r* (5 Pet., 190, 192, *seq.*), in which, after quoting Blackstone for the statement that it is the peculiar business of the "Court of King's Bench to superintend all other inferior tribunals,

and therein to enforce the due exercise of those judicial or ministerial powers with which the crown or legislature have invested them", the Chief Justice goes on to say that in the United States the Supreme Court "exercises both common-law and chancery powers; is invested with appellate power; and *exercises extensive control over all the courts of the United States.*"

Since that decision, the analogy between the powers of the two courts, and particularly the power of each to issue this particular writ, has been the subject of frequent allusion. (*Ex parte Vallandigham*, 1 Wall., 243; *American Construction Company* v. *Jacksonville Railway*, 148 U. S., 372, 380; *In re Chetwood, Pet'r*, 165, U. S., 443, 462.)

These suggestions will not, we trust, seem to the court irrelevant here. They are designed merely to indicate that, prior to the judiciary act of 1891, this court had inherited the power of the Court of King's Bench to issue the common-law writ of certiorari to all inferior courts as an original process "in furtherance of justice," and that when the Congress of 1789 clothed this court with that power, it must be presumed to have had in mind that it was then one of the principal attributes of that writ, unlike the writ of error, that it was awarded to the prosecutor in criminal cases; in other words, that as a process invoked by the state in the accomplishment of justice, it was well known in common-law criminal jurisprudence.

VII.

We come now to a consideration of the statute in which this writ, with these same attributes and functions, is first expressly mentioned in federal legislation, namely, the statute under which this petition was brought, section 6 of the judiciary act of 1891. That section must, of course, be construed in the light of the judiciary act of 1789 and of the common law. And the considerations to which we have just referred, so far as they may be thought to have force, are to be borne in mind in interpreting it.

Assuming, however, that this court did not possess authority under the act of 1789 to review a criminal case on certiorari on the application of the Government, there is no longer any question, as we have already pointed out, that Congress has the power to grant it such authority. There is no doubt that it may invest this court with jurisdiction "to require by certiorari or otherwise *any* such case" [made final in the Circuit Court of Appeals] to be certified to it for its review.

Here then we have legislative authority to confer broad and salutary remedial power, and apt language to confer it.

VIII.

While this is not the first time that the Government has called this court's attention to a criminal case in which a question raised seemed

to be of sufficient gravity and importance to justify the court in exercising its authority by certiorari, the occasions for it have rarely arisen. Such application was made in 1904, in the case of *United States* v. *Cadarr* (197 U. S., 475), where the writ was issued to the Court of Appeals for the District of Columbia, and the case reviewed, the jurisdictional question being passed *sub silentio;* and again, at the October term, 1906, in the case of *United States* v. *Morgan* (203 U. S., 595), where the application was denied upon grounds not stated. In neither of these cases was a constitutional question raised.

It would not be fair, however, to assume from the small number of these applications that the United States has practically construed the act of 1891—whatever may be inferred from its attitude toward the act of 1789—as if it did not confer upon this court authority to review a case like that at bar on certiorari on the application of the Government. The reasons why such a conclusion would not be warranted are not far to seek. In the first place, criminal cases raising questions of great national or general importance, are of rare occurrence. Moreover, it is generally conceded, and the Government has acted upon that belief, that, except for the determination of a question of an unusually momentous nature such as does not often arise, this extraordinary remedy should not be invoked. But there are still other obvious reasons why

the Government has not been obliged to importune this court with such applications: In the great majority of such cases—indeed, in praticcally all of them—the question is likely to be, as in the case at bar, a new question of constitutional construction or application, of which appellate jurisdiction is given to this court direct from the trial court. It is notoriously rare—almost never, fortunately—that a district or circuit court, or even a court of appeals, assumes to pass upon such a question adversely to its constitutionality. In almost all cases, the question has been carried directly from the trial court to this court under section 5 of the judiciary act.

In the comparatively few cases involving such a question which, since 1891, have gone on error to a circuit court of appeals, that court has almost invariably—and very properly and wisely in the interests of uniform and authoritative decision—either declined jurisdiction entirely, or certified the question to this court under section 6 of the act. It has been seldom, indeed, that a court of appeals has undertaken to pass finally upon a novel constitutional question—certainly one of such deep and far-reaching importance as the one raised on this record. While we do not suggest that there was any impropriety in the assumption of jurisdiction in this case by the Court of Appeals, we respectfully submit that the usual, and by far the better course for the court to pursue in such a

case, involving such a question, is to certify it, particularly where, as in this case, there was a division of opinion in the court; where, as in this case, the opinion of the majority was directly at variance with that of so eminent a judge as Chief Justice Shaw, and with the almost universal practice throughout the country; and where, too, as in this case, that decision, if it is to stand, will be most unfortunate in its effects upon criminal procedure in the circuit in which it was promulgated, and upsets the law and practice, long acquiesced in, in most, if not all, the States of the Union, as to an offense of the class for which the respondent was indicted.

It was only after the United States had requested the Court of Appeals for the First Circuit to certify this unusually important question, and that court had declined to do so, that recourse was had, as a last resort, to these proceedings.

We are not aware that any such request made to a divided court has ever before been refused during the seventeen years that courts of appeal have been in existence. In other words, we have no reason to doubt that this is the first time since the establishment of circuit courts of appeal that the United States has had any occasion to ask this court to exercise its authority by certiorari under section 6 of the judiciary act of 1891 in a criminal case involving a constitutional question. This being so, we ought to feel assured that your honors will not conclude that any infer-

ence is to be drawn adverse to our contention as to the court's power in this case from the fact that applications by the Government for certiorari in criminal cases have hitherto been conspicuously few.

But are we considering here a provision of statute as to which the argument of practical construction from non-user is applicable? It is not a provision peculiarly for the use and benefit of the United States, or its Department of Justice, any more than for any other party litigant. It is not, as we have already attempted to emphasize in another place in this discussion, a right conferred upon the United States, that is in question here, but the power of this court of its own motion to issue certiorari in *all* cases made final in circuit courts of appeal, in any circumstances, at any stage, and at the suggestion of any party, if only the public interests seem to demand the interposition of that power. Can this court be divested of its authority to use this writ in furtherance of criminal justice merely because from lack of fitting opportunity it has not been frequently invoked for that particular purpose?

If we are justified in urging, as we have repeatedly done in the course of this argument, that power was given to this court to issue certiorari under the judiciary act of 1891, not primarily in order that it might be invoked in the interests or for the benefit of the parties litigant in a suit, but in the attainment of justice for the welfare of

the people, that questions of "public and national importance" should be properly and authoritatively determined, there would seem to be little doubt as to the way in which the court will answer this question. Indeed the court has so frequently held in substance that neither the fact that the determination of a particular case is of vital importance to the private interests of a party seeking the writ nor that private property of very large value is involved in the case is sufficient to justify the issuing of the writ, that the question seems to be already answered. It is the public importance of the question raised, not the individual interests involved, which calls for intervention by the extraordinary remedial power.

Basing its contention upon the foregoing considerations and the others contained in the brief, the Government hopes to have demonstrated with regard to the writ of certiorari and the authority of this court to issue it at the suggestion of the United States in a criminal case under the circumstances at bar.

(1) That prior to the act of 1891 this court had the same authority, though infrequently exercised, to issue the writ to inferior courts that was possessed by the Court of King's Bench, and that the writ possessed the functions and attributes of the common-law writ; (2) that one of those attributes was that it was issued at the instance of the prosecutor in the administration of criminal justice, although it was never, perhaps, in this country,

claimed to be the prerogative of the State as it was, in England, of the King; (3) that it could not be said, therefore, even prior to 1891, that the suggestion that it be so used in any case would be an anomally or innovation, as has been said of writs of error; (4) that if it could be properly said that a close analogy exists between a writ of error and a writ of certiorari, the innovation which was the ground of the construction put upon section 5 in the *Sanges* case has now at last been accomplished, and the right of appeal by the United States in criminal cases recognized and affirmed; (5) that Congress clearly had the power to give this court authority to issue a writ of certiorari in all cases made final in the Circuit Court of Appeals, including a case like that at bar; (6) that it has, in terms, given this court such power "in any case," by section 6 of the judiciary act, which, being a remedial statute and a statute conferring power upon the court in the interests of the public, must be liberally construed, as liberally as the court has construed it in *Forsyth* v. *Hammond* (166 U. S., 506, 512-14); (7) that it must not be lost sight of that what we are discussing here relates to the broad supervisory power of this court, affirmed in 1831, in *Ex parte Crane*, over the whole field of federal jurisprudence, and not to a right of a party litigant, whether plaintiff or defendant, whether prosecutor or accused; (8) that the occasion for exercising or invoking it in criminal cases is not

frequent, and that the United States, at least since the act of 1891, has had little opportunity to do so; and (9) that even if this were not so, in view of the purposes of the act, such neglect should have no significance in construction.

CHARLES J. BONAPARTE,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.
ASA P. FRENCH,
United States Attorney.

APPENDIX.

ACT OF MARCH 3, 1891, SECTIONS 5 AND 6 (26 STAT., 827–828).

SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of conviction of a capital or otherwise infamous crime.

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases.

SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final

decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.

And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

ACT OF MARCH 2, 1907 (34 STAT., 1246).

CHAP. 2564.—An Act Providing for writs of error in certain instances in criminal cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the validity, or construction of the statute upon which the indictment is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The writ of error in all such cases shall be taken within thirty days after the decision or judgment

has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant.

O

Supreme Court of the United States.

October Term, 1907. No. 736.

UNITED STATES,
Petitioner,
v.
JOHN W. DICKINSON,
Respondent.

Office Supreme Court, U. S.
FILED,
APR 27 1908
JAMES H. McKENNEY,
Clerk.

In Petition for Writ of Certiorari.

BRIEF FOR THE RESPONDENT.

FRANK W. HACKETT,
POWERS & HALL,
Attys. for Respondent.

Judd & Detweiler, Printers, 727 Colorado Building,
Washington, D. C.
1908.

Supreme Court of the United States.

UNITED STATES,

PETITIONER,

v.

JOHN W. DICKINSON,

RESPONDENT.

In Petition for Writ of Certiorari.

BRIEF FOR THE RESPONDENT.

STATEMENT OF FACTS.

The respondent Dickinson and one Foster were jointly indicted under Section 5209 of the Revised Statutes, which is a part of the National Bank Act. The material portion of this section is as follows:—

> Every president, director, *cashier*, teller, clerk, or agent of any association who embezzles, abstracts, or *wilfully misapplies* any of the moneys, funds, or credits of the association . . . with intent, in either case, to injure or defraud the association; . . . *and every person who, with like intent, aids or abets* any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

Foster, the principal defendant, was cashier of the South Danvers National Bank, and was charged with wilfully

misapplying the funds of the bank, and Dickinson was charged with aiding and abetting. Both having been convicted, Dickinson sued out a writ of error, and after very full argument before the Circuit Court of Appeals for the First Circuit, his conviction was held invalid by that court by reason of the fact that the verdict against him was found by a jury of only ten men.

The facts are thus stated in the opinion of the Circuit Court of Appeals (Record, p. 225):—

> The full jury of twelve was empanelled and the trial commenced. While it was proceeding it appeared that one of the jurors, by reason of illness, was unable to sit further, whereupon the following agreement was filed of record:—
>
> > Whereas one of the jurors impanelled to try the above-entitled indictment is unable by reason of illness to further sit therein,
> >
> > Now, therefore, we consent and agree that the said juror, to wit, Charles F. Low, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining eleven jurors with the same force and effect as if said juror had not been discharged.
> >
> > JOHN W. DICKINSON.
> > GEORGE M. FOSTER.
> > UNITED STATES,
> > *by* BOYD B. JONES,
> > *Special Assistant U. S. Attorney.*
>
> The court proceeded with the trial with the remaining eleven jurors. Subsequently, the trial being still unfinished, death occurred in the family of one of them, and another like agreement was filed of record as to him. The trial proceeded with the remaining ten jurors, who returned a verdict, subsequently to which a motion in arrest of judgment was filed as follows, and overruled:—
>
> > And now, after verdict against the said John W. Dickinson, and before sentence, comes the said John W. Dickinson, by his attorneys, and moves the court here to arrest judgment herein and not pronounce the same, because of manifest errors in the record appearing, to wit: Because the said verdict against the said John W. Dickinson was found by a so-called jury consisting

of ten (10) jurors only, and not by a jury of twelve (12) jurors, as required by the Constitution and laws of the United States, and because no judgment against him, the said John W. Dickinson, can be lawfully rendered on said verdict.

POWERS & HALL,

Attorneys for the said Defendant.

It is the question thus raised which the United States by its petition for *certiorari* asks this court to review.

Definition of the Question on which Review is Sought.

The statement of the question involved which is found on the opening page of the petition is so worded as to indicate a radical misconception of the grounds on which the argument for the respondent before the Circuit Court of Appeals and the opinion of that court alike proceeded. The petition states the question to be whether the respondent, under substantially the circumstances above outlined, "can have judgment against him arrested on the ground that he has been deprived of a constitutional right which he could not waive." (Petition, p. 1.) The misconception indicated by this mode of expression requires to be corrected at the outset, as an accurate statement of the question will in itself go far toward answering the contentions advanced by the government in its petition and brief.

The objection to the verdict and to the judgment rendered thereon was based on the second section of Article III of the United States Constitution, which provides that "*the trial of all crimes*, except in cases of impeachment, *shall be by jury*," and the fundamental question is whether this provision merely guarantees a right to the defendant for his own benefit, or whether it is a part of the frame of government, an authoritative definition of the only form of procedure by which under the Constitution indictments for crime can be tried and determined. In the former case the principle might very naturally apply which as a general

rule permits a party to waive any right created solely for his benefit. In the latter case the language of waiver would have no application whatever, the defendant and the district attorney having no more power than any other individuals to give legal effect to a form of procedure wholly unauthorized by the Constitution. Under such a construction a trial by consent of the parties without a constitutional jury would be, in the language of Judge Cooley, only a species of arbitration (Cooley's Constitutional Limitations, 7th ed., pp. 458–459), and a sentence of imprisonment based on such a trial could no more be squared with the Constitution on the ground of waiver than if instead of a judge and ten jurors the parties had agreed to leave the matter to the determination of three arbitrators, or to decide it by throwing dice.

This distinction between a guaranty of a personal right and a governmental regulation is very clearly stated by the Circuit Court of Appeals as the ground of its decision.

> On the other hand, the provisions of section two of Article III. are peremptory in form, and point out absolutely the tribunal which must dispose of the crimes to which they refer. They cover nothing except what concerns the public interests, as well as personal liberty. The Article in unqualified terms establishes the tribunal. Inasmuch as the public, as well as the persons charged, have always an interest in what tribunal shall dispose of prosecutions for high crimes, it would appear *prima facie* that no prosecuting officer nor any person accused, whether acting separately or by agreement, can substitute another locality or another tribunal for that which the letter of the Constitution designates.
>
> The tribunal pointed out by Article III. consists of a jury, and, by necessary implication, of a court established under the Constitution and the laws, with a judge or judges appointed also according to the Constitution and the laws to preside therein. We have said that there is no authoritative determination with reference to the topic before us; but the jury to be empanelled for a criminal cause within the meaning of the Constitution has been directly and authoritatively determined in *Thompson* v. *Utah*, 170 U. S. 343, to consist of twelve. With the aid of this determination, the third Article points out perfectly the elements of the tribunal authorized to proceed against persons accused of crimes like that before us, including

equally the court, the judge and the jury, and the number composing the jury. Has any one other than the makers of the Constitution, or those authorized to amend it, the power to substitute for what is thus declared? No one has ever conceived an affirmative answer as to the court or judge; and the apparent answer as to the jury would also be in the negative. (Record, p. 228.)

The question is not therefore whether the defendant could waive a constitutional right guaranteed to him personally, but whether the constitutional provision is not of such a character that any agreement between the parties for a different tribunal from that provided by the Constitution is necessarily without legal effect, and therefore immaterial.

ARGUMENT.

The "special reasons why *certiorari* should issue" enumerated in the petition (p. 6) fall into three groups and will be so examined.

A. THE IMPORTANCE AND ALLEGED NOVELTY OF THE QUESTION.

The first three grounds relied on in the petition are as follows:—

1. This case involves a constitutional question, the importance and far-reaching effect of which can not be easily exaggerated.
2. The question, it is conceded, has never been passed upon by this court.
3. The occasion for application of the principle contended for by the United States is of frequent occurrence in the trial of criminal cases, and the denial of that principle absolutely prevents the Government and a defendant from entering into a stipulation, even in the case of a misdemeanor, which would oftentimes save great expense to both parties and great loss of time to the court.

Of these three propositions the respondent takes issue chiefly with the second one. The first and third are expressed so strongly, however, that they cannot be dismissed

without a brief word of comment. It is of course assumed that in discussing the importance of the question here involved the government refers to its general importance rather than to its effect on the particular case. From this point of view the respondent suggests, without any desire to quibble over words, that "the importance and far-reaching effect" of the question can be exaggerated and have been somewhat exaggerated by counsel for the United States. It would be easy to think of a great many constitutional questions whose decision has involved or would involve a much more important and far-reaching effect than the decision of the question raised in the present case.

Some such exaggeration appears in the third proposition, which is perhaps best answered by reference to a fact which the petition itself recognizes and relies on. If a distinction is to be drawn between cases in which the trial started with a full jury and cases in which there was not a full jury at any stage (and the whole argument of the petition is based on such a distinction), then it appears that the question here involved has never before in over a century of criminal administration required the determination of any federal court.

For the purposes of the argument the respondent concedes that the question is of sufficient practical importance so that, if the existing decisions of this court threw no light upon it, a review of the present case might well be justified,—if only for the purpose of reaffirming with conclusive authority the decision of the Circuit Court of Appeals. If, however, that decision merely follows prior decisions of this court, the grounds of which, being fully set forth in the opinions, are plainly applicable to the case at bar, the respondent submits that this case is not of such far-reaching importance, nor the precise situation of such every-day occurrence, as to require that this court exercise its extraordinary jurisdiction by *certiorari* in order merely to reaffirm previous decisions and to deny the validity of unsubstantial distinctions.

This brings us back to the second ground stated in the petition, which is to the effect that "the question, it is conceded, has never been passed upon by this court." The respondent recognizes this as the fundamental ground of the petition, and by no means concedes the proposition stated without important qualifications. On the contrary, the respondent contends that all the questions necessary to be decided in order to determine the validity of the verdict in the present case have already been decided by this court, and that the distinction by which it is sought to take the case outside the scope of those decisions appears on the briefest examination to be untenable.

The decision of the Circuit Court of Appeals was based upon the provision of Article III of the Constitution, to the effect that "the trial of all crimes shall be by jury," and may be resolved into the following propositions:—

1. Article III is an absolute definition of the only tribunal before which indictments for offences within its terms can be legally tried and determined.

2. The offences within its terms, defined by the words "all crimes," include the offence charged in the case at bar, and the trial of that offence was, therefore, subject to the constitutional requirement.

3. The jury required is a jury of twelve.

4. The constitutional requirement is not satisfied unless there is a legally constituted tribunal not merely at the beginning, but throughout the entire trial. If the verdict is not rendered by a constitutional jury, the defect is not cured by the fact that a constitutional jury heard a portion of the evidence.

The first three propositions are covered by express decisions of this court, and, so far as they relate to the beginning of the trial, they are in effect conceded by the government, leaving the fourth proposition as the only one in dispute. This appears from the following statement on page 9 of the petition:—

The Government did not contend that a defendant could, before his trial, agree that the tribunal before which he was to be put upon trial should be made up of a judge and less than twelve jurors, *because the defendant would then be consenting to the creation of something which was not a court.* What the Government contended was, that if, on the other hand, jurisdiction over the trial is obtained by the organization of a constitutional court, and the court so constituted is subsequently diminished, with the defendant's consent, by one or two jurors, the trial may proceed and a lawful verdict be taken from the jury which has in this way suffered a "fractional loss."

With all deference to the conclusions of the majority of the learned judges of the Circuit Court of Appeals, it is submitted that the error of their opinion lies in the fact that it makes no distinction between an agreement on the part of the defendant to be tried *by an illegally constituted tribunal—that is to say, one originally made up in a manner contrary to the requirements of law*—and an agreement, after the tribunal has been in all respects legally constituted, to assent to that which, in the apt language of Mr. Justice Holmes in *Interstate Consolidated Street Railway Company* v. *Massachusetts* (207 U. S. 79), may be termed a "fractional loss."

It is evident that the distinction on which the government thus places its sole reliance can be maintained only by showing that the reasons which, as conceded by the government, imperatively require a full jury at the outset, become inapplicable when the number is diminished at a later stage of the proceeding. What these reasons are will appear most clearly by examination of the decisions by which the first three of the above propositions are established.

1. Article III is an absolute definition of the only legal tribunal.

The distinction between a guaranty of a personal right and what is called in

Schick v. *United States*, 195 U. S. 65, 72,

a "constitutional or statutory mandate" has frequently been recognized by this court. For example, in

Ex parte Bain, 121 U. S. 1, 12–13,

it was held that the provision of the Fifth Amendment, requiring an indictment by the grand jury in case of infamous crimes, though found in that part of the Constitution regarded in general as in the nature of a bill of rights, nevertheless defines a condition "indispensable to the power of the court" to try the prisoner.

Cf. *Ex parte McClusky*, 40 Fed. 71, accord.

So in

Hopt v. *Utah*, 110 U. S. 574, 579,

the court decided that

> it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. . . . If he be deprived of his life or liberty without being so present such deprivation would be without that due process of law required by the Constitution.

That the requirement of jury trial in Article III of the Constitution is of this imperative character was expressly decided in

Thompson v. *Utah*, 170 U. S. 343,

where the court said (page 353):—

> It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons.

It is settled therefore by express decision of this court that Article III belongs to the class of imperative constitutional mandates which cannot be modified by any agreement between the prosecuting officer and the accused.

2. The offence in the case at bar is within the constitutional provision.

Thompson v. *Utah* was a case of felony, but it is settled by other decisions and is not now questioned by the government that Article III applies equally to serious misdemeanors, in fact to all except

> a class of petty or minor offenses, not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury.
>
> *Callan* v. *Wilson*, 127 U. S. 540, 555.

On page 549 of the same case the court says:—

> It is not to be construed as relating only to felonies, or offences punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a "crime" within the meaning of the third article, or a "criminal prosecution" within the meaning of the Sixth Amendment.

Examples of such petty offences are found in

> *Natal* v. *Louisiana*, 139 U. S. 621.
> *Schick* v. *United States*, 195 U. S. 65.

The offence in the present case is punishable by ten years' imprisonment, which under section 5541 of the Revised Statutes may be in the penitentiary. It is an infamous crime under the Fifth Amendment.

> *Ex parte Wilson*, 114 U. S. 417.

It is in all respects a more serious offence than the misdemeanor involved in *Callan* v. *Wilson*, and is certainly not a petty offence within the language of that case and the *Schick* case.

The offence being thus determined to be a "crime"

within Article III, the construction of that article in *Thompson* v. *Utah*, as an imperative mandate requiring a jury of twelve to give any validity to the proceedings, necessarily applies to the present case with full force. Article III can hardly be an absolute mandate as to part of the "crimes" to which it refers, and a guaranty of a personal privilege as to the rest. Accordingly, it is clearly recognized in the *Schick* case that once an offence, whether felony or misdemeanor, is brought within the definition of "all crimes" in Article III, no waiver of the terms of that provision can be effective, and the greater part of the opinion is occupied with a discussion of the question whether the offence there involved was within the scope of that article. What is there said of waiver of the *right* of jury trial guaranteed by the Sixth Amendment is carefully limited on page 72 to cases "where there is no constitutional or statutory mandate . . . prohibiting,"—in other words, to those petty offences which are held not to be within the terms of Article III.

3. The jury must be a jury of twelve.

That the jury required by Article III is a jury of twelve is authoritatively determined, upon grounds stated at length in the opinion, by the case of

Thompson v. *Utah*, 170 U. S. 343 (above cited).

It thus appears, as stated above, that, so far as the decision of the Circuit Court of Appeals involved the first three propositions above enumerated on page 7, it merely followed existing decisions of this court. To escape the effect of those decisions, and to support the contention that the question has never been passed upon by this court, the petition relies entirely on the alleged distinction between a trial beginning without a full jury or with no jury at all, and a trial in which a jury originally complete is later diminished in number.

The fourth proposition involved in the decision of the Circuit Court of Appeals, and the one with which the government thus takes issue, must now be considered.

4. The constitutional requirement is not satisfied unless there is a legally constituted tribunal not merely at the beginning, but throughout the entire trial.

It is true that no case has come before this court in which the facts presented precisely this question. It therefore remains to inquire whether the distinction relied on by the government can be supported on any logical ground, and whether, to adopt a phrase from the petition, less is necessary to *constitute a court* when the verdict is rendered than when the district attorney rises to make his opening statement.

It is believed that, in attempting to draw the distinction above stated, counsel for the United States were under the influence of the same misconception of the question at issue which was pointed out at the beginning of this brief, and were misled by a resulting failure to distinguish between cases arising under the United States Constitution as construed by this court, and such cases as

Commonwealth v. *Dailey*, 12 Cushing, 80,

which is cited in their petition and brief. That case arose under a provision of the Massachusetts Constitution very differently worded from Article III of the Constitution of the United States, and proceeded distinctly on the ground that the Massachusetts provision is "*lex pro se introducta*," a guaranty of a personal privilege, like many of the amendments to the United States Constitution, including, as shown by the *Schick* case, the Sixth Amendment. It necessarily follows from this construction of the Massachusetts provision, that there is no *constitutional prohibition* against a criminal trial in the courts of that state with less than twelve jurors by consent of the defendant, and this is equally

true whether the trial starts with less than that number or a jury originally composed of twelve is subsequently diminished.

Cf. *Jones* v. *Robbins*, 8 Gray, 329, 341.

The objection intimated by Chief Justice Shaw, on page 83 of the opinion in the *Dailey* case, to permitting a trial with less than twelve by consent "unless upon some unforeseen or urgent exigency," was evidently based on considerations of public policy and a natural desire to discourage too easy or frequent a departure from established and time-honored forms. He therefore suggested that the whole matter would be regulated by the discretion of the presiding judge,—a suggestion obviously incompatible with an imperative constitutional requirement. Under the construction thus applied by the Massachusetts court to the state constitution, a distinction such as the government seeks to draw in the present case would be logical, simply because the whole question is treated as one of discretion, and there would ordinarily be no occasion for the exercise of such discretion at the outset of the trial.

Under the Massachusetts doctrine, therefore, the constitutional objection to a reduction of the number of jurors by consent is *entirely eliminated*, on the ground that the constitution merely secures a personal right which can be waived; and the distinction (if any is intended to be suggested) between such reduction in the number at the beginning and a similar reduction at a later stage must be understood to rest on considerations altogether independent of any constitutional prohibition.

But the situation under Article III of the Federal Constitution is entirely different. That article being construed as an absolute constitutional mandate prescribing the only tribunal before which an indictment for crime can legally be tried, it cannot be eliminated from the case by any wish or consent of the defendant, and it goes almost without saying that the defendant and the district attorney cannot any more

effectively amend the Constitution at one stage of the trial than at another.

The distinction which the government asserts must be supported, if at all, on a ground which satisfies, rather than dispenses with, the imperative requirement of trial by jury. There would be one possible ground on which, if there were any historical basis for it, such a result might be reached. If there had been under the common law of England, or perhaps that of Massachusetts before the adoption of the Federal Constitution, a practice by which the discharging of one or more jurors by consent in the course of the trial was one of the incidents of the common law trial by jury, it would be logical and in harmony with established principles of constitutional construction to hold that such a practice is a part of the definition of trial by jury as those words are used in the Constitution. A verdict rendered under such circumstances by less than twelve jurors would then be supported, not because the requirement of Article III had been waived by the defendant, but because the defendant would have had a jury trial within the meaning of that article. But all the industry and learning of counsel on both sides of this case and of the judges of the Circuit Court of Appeals has failed to discover any trace of such a common law practice.

The definition of a jury in *Thompson* v. *Utah*, as necessarily composed of twelve men, must therefore stand without qualification, and there is no other possible ground on which it can be held that the Constitution absolutely requires such a tribunal at the beginning of the trial and does not equally require it at the time of verdict. The constitutional provision is as much a part of the frame of government at the end of a trial as at the beginning. The petition admits that a tribunal originally composed of a judge and less than twelve jurors would not be a court. But there is equal necessity for a court when the verdict is rendered. The language of

Callan v. *Wilson*, 127 U. S. 540, 557,

is fully applicable to the present case,—"a judgment of conviction not based upon a *verdict of guilty by a jury* is void."

The government's position receives no support from any of the state court decisions on the question. There are several states in which a verdict is held valid when one of the jurors has been excused by consent in the course of the trial. See for example

State v. *Sackett*, 39 Minn. 69.
State v. *Kaufman*, 51 Iowa, 578.
Cf. *State* v. *Ellis*, 22 Wash. 129.

But in all these cases, as in *Commonwealth* v. *Dailey*, the decision proceeds on the ground that the provision of the state constitution is merely a guaranty of a personal right.

On the other hand, wherever the constitutional provision has been held to be an imperative definition of the only legal mode of procedure, waiver or consent has been held ineffectual to modify the rule at any stage of the trial.

Cancemi v. *People*, 18 N. Y. 128.
People v. *O'Neil*, 48 Cal. 257.
State v. *Mansfield*, 41 Mo. 470.
State v. *Simons*, 61 Kan. 752.
State v. *Scruggs*, 115 N. C. 805.

The respondent is not aware that the distinction relied on by the government has ever been even suggested in any case where the constitutional requirement was thus construed as an absolute provision of the frame of government. After an elaborate and thorough examination of the authorities on the whole subject the Circuit Court of Appeals dealt with this point in its opinion in this case as follows:—

It will be noticed that the trial commenced with the constitutional tribunal; that is, a court organized under the Constitution and laws of the United States, with authority to try the offence in question, and a judge of that court duly appointed and commissioned, and authorized to preside at the trial, and a constitutional jury. The difficulty arose subsequently. We refer to these facts so that it may be understood

that we do not overlook them, although neither party has made any distinction between a case where the full jury is first empanelled and jurors are subsequently withdrawn with consent of one, and where, with like consent, the jury was from the beginning deficient in numbers. We are not aware that any court or text writer has ever made any distinction on this score, and we will not attempt one. (Record, pp. 225–226.)

The language of Mr. Justice Holmes in

Interstate Consolidated St. Ry. Co. v. *Massachusetts*, 207 U. S. 79, 87,

quoted both in the petition (p. 9) and in the dissenting opinion of Judge Aldrich (Record, p. 237), cannot be perverted to cover such a case. The learned justice was there dealing with personal rights guaranteed by the Constitution, and expressed in new and apt language the established doctrine that certain of the broadest of such rights are given subject to certain implied qualifications, necessary for the public weal, and founded upon ancient understanding and practice under the common law. Once more it must be pointed out that we are dealing in the present case not with a personal right guaranteed by the Constitution, but with a part of the frame of government. Moreover, to quote another phrase from the same opinion, both the decision of the Circuit Court of Appeals and the authorities in this court which that decision followed are in harmony and not in conflict with "the traditions and habits of centuries."

The respondent therefore submits that the decision of the Circuit Court of Appeals in the case at bar represents merely the direct application to a new case of principles clearly settled by existing decisions of this court, and that the grounds of the former decisions leave no room whatever for the distinction on which the government places its sole reliance in the present case. Having once clearly and fully enunciated the principle which governs a particular class of cases, the Supreme Court can hardly be expected to issue successive writs of *certiorari* merely to apply that principle

to every case presenting such a difference in its facts as bears no relation to the foundation of the principle.

B. THE ALLEGED CONFLICT BETWEEN THE DECISION OF THE CIRCUIT COURT OF APPEALS AND DECISIONS OF STATE COURTS.

The fourth and fifth grounds assigned in the petition for the issue of the writ are as follows:—

> 4. The majority opinion of the Circuit Court of Appeals is directly contrary to the law of Massachusetts as laid down by Chief Justice Shaw. (*Commonwealth* v. *Dailey*, 12 Cush. 80.)
>
> 5. It overrides the uniform practice in Massachusetts, Maine, and New Hampshire, and which, it is believed, prevails generally throughout the United States.

These propositions are evidently framed in the endeavor to bring the case within the following language, which was used by this court, in speaking of the power to issue writs of *certiorari*, in

Forsyth v. *Hammond*, 166 U. S. 506, 514–515:—

> It is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, *the necessity of avoiding conflict* between two or more Courts of Appeal, or *between Courts of Appeal and the courts of a State*, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.

The sort of conflict between the Circuit Court of Appeals and the courts of a state which is there referred to is of course a conflict on some question of substantive law, which may come for decision before either the state court or the federal court according to the citizenship of the parties and other circumstance affecting their choice of tribunal. A conflict on such a question necessarily creates confusion and doubt as to legal rights, since those rights will be differently

administered, and the same transaction will have different legal effects, according to the court before which the question is brought for determination. But no such doubt or confusion arises out of a difference of decision on a question purely of procedure. It is only in civil cases at common law that any attempt is made to conform federal practice to the practice of the states, and there are many rules in regard to the conduct of criminal trials in the United States courts which differ from the corresponding rules in force in the courts of the states. Even if, therefore, the decision of the Circuit Court of Appeals in this case were necessarily inconsistent with the decision of the Massachusetts court in *Commonwealth* v. *Dailey* above referred to, this would furnish no ground for the intervention of the Supreme Court by *certiorari*.

In fact, however, there is no necessary inconsistency. The two decisions construed entirely distinct constitutional provisions, expressed in very different language, and the fact that different results were reached involves no more conflict than the decision in

Schick v. *United States*, 195 U. S. 65 (above cited),

that, while Article III is an imperative and mandatory requirement, the Sixth Amendment is merely a guaranty of a personal privilege.

A similar answer may be made to the government's fifth proposition above quoted. The decision of the Circuit Court of Appeals in this case does not "override" the practice in any state of the Union. It has nothing to do with the practice adopted in the various states under their variously worded constitutional provisions. It merely construes, in accordance with previous decisions of this court, a clause in the United States Constitution which has no relation to the practice of the state courts.

It may be added that the state courts are very nearly evenly divided, in the interpretation of their several constitutional provisions as to jury trial, between the construction which treats the constitutional provision as a guaranty of a personal

right and that which treats it as an imperative definition of the only legal mode of procedure. (See, for example, cases cited above on page 15.)

It may also be remarked, in passing, that no constitutional provision expressed in such mandatory language as that found in Article III of the Federal Constitution has ever been held to create merely a personal right, or to be subject in any way to waiver by the accused.

C. MISCELLANEOUS GROUNDS ALLEGED IN THE PETITION.

The remaining grounds stated in the petition for the intervention of this court are as follows:—

> 6. The question is vital to the case at bar, for if the decision of the Court of Appeals stands, it will, though not a final judgment, result—because of lapse of time and loss of evidence which preclude the possibility of another trial—in the escape of the defendant from the consequences of a serious offense of which, after a three months' trial, ten men, by whose decision he agreed to abide, have found him guilty.
>
> 7. It is also, perhaps, not unworthy of consideration that the decision of the majority of the court incidentally allows the defendant to profit by conduct which, measured by ordinary standards, was a deliberate breach of good faith on his part toward the court and toward the Government.
>
> 8. Of the four judges who have already passed upon the question, including the trial judge, two (Lowell, circuit judge, and Aldrich, district judge) have upheld the contention of the Government.

The respondent is in some doubt as to how far the action of this court on petition for *certiorari* will be influenced by considerations which are important only with reference to the particular case.

Passing over this point, however, there is nothing in the government's sixth and seventh propositions which requires elaborate answer.

If it be true, as the government asserts, that lapse of time

and loss of evidence have affected the possibility of another trial, that danger is one which the prosecuting officer should have considered before he attempted by agreement with the defendant to set up a tribunal unauthorized by the Constitution.

Since the government in its sixth proposition has gone outside the record, the respondent takes the same privilege. The length of time which elapsed between the verdict (rendered March 20, 1903) and the decision of the Circuit Court of Appeals was not the fault of the respondent. Although the evidence in the case was extremely voluminous and complicated, and new counsel came into the case in the May after the trial, the respondent's bill of exceptions was filed on July 27, 1903. The final settlement of the exceptions was delayed for some three years, without any fault of the respondent or his counsel, by repeated changes, through death and resignation, in the office of the district attorney, and the difficulty found by new incumbents of that office in giving the necessary amount of time to the case. During all this time the intention of counsel for the respondent to file a motion in arrest of judgment on the ground of the invalidity of the verdict was known to the district attorney's office. The delay was wholly unwelcome to the defendant, and the difficulty over the settlement of the exceptions was finally met by counsel for the defendant voluntarily undertaking the task of redrawing the bill of exceptions in conformity with certain suggestions of the government's attorneys, which the latter had never found time to put into concrete form.

After the present district attorney took office, the case was pushed to a hearing as rapidly as both parties could prepare for it.

The emphasis which the government attaches to the possibility that the respondent may not serve a sentence for an alleged offence of which he has never yet been legally convicted, is difficult to reconcile with the course the government has adopted toward his co-defendant Foster, the principal

defendant on whose guilt the guilt of Dickinson necessarily depended. Foster was tried jointly with Dickinson, and was found guilty five years ago under the same circumstances by the same verdict of ten jurors to which the government now attaches such significance and on which Dickinson was sentenced. Foster filed no exceptions and sued out no writ of error, but he has never been called for sentence, nor his bail renewed, and it is evident that the prosecution against him has been abandoned.

The government's seventh proposition, so far as it is material at all, is only an attempt to argue in another form that Article III ought not to be given the peremptory effect which its language requires and which the decisions of this court have given it.

The morality of the defendant's course in raising, on advice of counsel, the objection which the Circuit Court of Appeals held to be fatal to the validity of the verdict, is a question on which there are two sides, and which it is neither material nor appropriate to discuss at length here. It is a consideration, however, to which this court has more than once referred, and which has influenced many of the decisions, that one on trial upon a criminal charge is necessarily under a sort of duress which affects his will and judgment in connection with the proceedings of his trial. Even as a moral question, therefore, his agreement or waiver or consent ought not in all cases to be regarded in the same light as the contract of an absolutely free agent in a matter belonging to the ordinary affairs of life.

The petition several times says that the decision to continue the trial without a full jury was reached at the *request* of the defendant. There is no authority in the record for this statement except the assertion of counsel for the United States in the "answer to the motion in arrest of judgment" on page 52 of the record. Neither the present district attorney nor the present counsel for the respondent were connected with the case at the time of the trial, but counsel for the respondent are prepared to assert on reliable infor-

mation and belief that the respondent was with difficulty persuaded to consent to a proceeding which he believed at the time involved a danger to his interests.

But too much has already been said on points which are believed to be wholly immaterial.

The government's eighth proposition is stated rather strongly, so far as it relates to Judge Lowell. Some inference as to his first impression can perhaps be drawn from the fact that he permitted the trial to proceed under the stipulations filed by the parties. But it is hardly fair to treat this as equivalent to an opinion rendered after full argument and examination of authorities. The government is entitled under this head of its argument only to such advantage as may arise from the fact that one judge on the Circuit Court of Appeals dissented, and the respondent submits with all deference that the grounds on which the dissent is rested are completely answered by the majority opinion, and by the decisions of this court cited above.

D. THE QUESTION OF JURISDICTION.

The arguments thus far presented have been addressed to the discretion of the court, by which its action on any petition for *certiorari* is governed, when there is no question of the power of the court to issue the writ. In the present case, however, it is by no means clear that the court has that power.

The Supreme Court has no general power to issue writs of *certiorari* without express statutory authority, and such authority in this case must be found, if at all, in the Act of March 3, 1891, commonly called the Judiciary Act.

Ex parte Gordon, 66 U. S. 503.
American Construction Co. v. *Jacksonville, etc., Ry. Co.*, 148 U. S. 372, 380.

This was the act by which the Circuit Court of Appeals was created, and in the language of this court in the case last cited (p. 382) the entire appellate jurisdiction from the circuit and district courts of the United States was distributed between the Supreme Court and the circuit courts of appeals. Section 5 of the Act provides that appeals or writs of error may be taken from the district and circuit courts direct to the Supreme Court in certain enumerated cases. Section 6 provides as follows:—

> The circuit courts of appeals . . . shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, . . . and the judgments or decrees of the circuit courts of appeals shall be final in all cases . . . under the criminal laws . . . excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.
>
> . . . . . .
>
> And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination *with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.*

None of the cases cited by the government are sufficient to show the existence of the power now in question, and the reasons for the decision of this court in

United States v. *Sanges*, 144 U. S. 310,

would seem to be fully applicable to the present case. In that case the defendants had been indicted for conspiracy to deprive a citizen of a right secured to him by the Constitution of the United States, and on demurrer to the indictment a question of the construction or application of the Constitution was directly raised. Section 5 of the act above

referred to authorizes appeals or writs of error direct from the district or circuit courts to the Supreme Court "in any case that involves the construction or application of the Constitution of the United States." The demurrer having been sustained, the government attempted to take the case to this court by writ of error under the above provision of the statute. Although the case was thus within the express terms of the act, the court held upon historical grounds that, without a specific provision conferring upon the United States the right to bring up a criminal case after judgment below in favor of the defendant,

> it is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States. (p. 323.)

It was the evident purpose of the act creating the circuit courts of appeals, as stated in the passage already referred to in *American Construction Company* v. *Jacksonville, etc., Railway Company*, to relieve this court of the overburden of cases and distribute between the circuit courts of appeals and this court all the previously existing appellate jurisdiction from the district and circuit courts,—not to establish appellate jurisdiction in a class of cases in which it had not before existed. If Section 6 of the Judiciary Act, instead of making the judgment of the circuit courts of appeals in certain cases final, subject to the power of *certiorari*, had provided that in all cases over which those courts have appellate jurisdiction there should be of right an appeal or writ of error or review of the case by the Supreme Court, it must have been held, under the decision in the *Sanges* case above cited, that such a general provision did not authorize a writ of error or review in a criminal case decided against the government. Both the language of the provision for *certiorari* and the evident intention of the act as a whole indicate that the procedure by *certiorari* was merely substituted for the procedure by writ of error or appeal, and was

not intended to give a right of review by *certiorari* under circumstances in which such review would constitute, in the language of the *Sanges* case, a serious and far-reaching innovation in the criminal jurisprudence of the United States.

The case of

United States v. *Cadarr*, 197 U. S. 475,

on which the government relies, fails to establish the proposition contended for. In the first place it does not appear that either party in that case raised any question of jurisdiction, and this fact is somewhat significant. As pointed out in

United States v. *Sanges* (above cited), at p. 319,

the Supreme Court in 1803 took jurisdiction of a writ of error sued out by the United States in a criminal case, no objection being made (*United States* v. *Simms*, 5 U. S. 252), but, when the objection was later raised in a like case, the court held that it had no jurisdiction, and that the former case, in which the point was not raised, was for that reason not binding.

United States v. *More*, 7 U. S. 159, 172.

A similar incident, occurring in the October term 1885, is also referred to in the *Sanges* case (p. 320).

The assumption of jurisdiction in the *Cadarr* case, however, requires no such explanation. That case arose in the District of Columbia under a code which gives to the government the same right of appeal in a criminal case that is given to the defendant, except, however, that a verdict in favor of the defendant cannot be set aside.

Code of Law for the District of Columbia, Sec. 935.

Section 234 of the same code provides for *certiorari* from the Supreme Court in any case in which the judgment of the Court of Appeals is made final, which includes criminal cases.

In the *Cadarr* case a motion to quash the indictment had

been sustained by the Supreme Court of the District, and the government had appealed to the Court of Appeals, which had affirmed the judgment of the Supreme Court. Thereupon a writ of *certiorari* was issued by this court on petition of the government. It thus appears that (to use the language of the *Sanges* case) the "innovation in criminal jurisprudence," involved in allowing appeal by the government in a criminal case, had been made by express statute, and, there being no longer any distinction between the right of the government and that of the defendant in the matter of appeal in such a case, there was little ground for making such a distinction in the matter of *certiorari*.

In the absence of a similar statute applicable to the federal courts in the various circuits, the issue of a writ of *certiorari* in the case at bar would seem to be entirely inconsistent with the reasoning and the decision in

United States v. *Sanges* (above cited),

and finds no authority in any of the cases cited by the government.

If these considerations did no more than raise a doubt of the power of the court, the respondent submits that the occasion for the issue of the writ can hardly be regarded as sufficiently urgent to require the exercise of a doubtful jurisdiction.

Respectfully submitted,

FRANK W. HACKETT,
POWERS & HALL,
Attorneys for Respondent.

Supreme Court of the United States.

October Term, 1908. No. 805.

UNITED STATES,
Petitioner,
v.
JOHN W. DICKINSON,
Respondent.

Supreme Court, U. S.
FILED
JAN 7 1909
JAMES H. MCKENNEY
Clerk

On Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

APPENDIX TO RESPONDENT'S BRIEF.

POWERS & HALL,
Counsel for the Respondent.

BOSTON:
Geo. H. Ellis Co., Printers, 272 Congress Street.
1909.

APPENDIX.

In the dissenting opinion in the case at bar the following opinion is expressed as to the current English understanding and practice on the question of waiver of the full number of jurors (Record, p. 178):—

> I do not agree that the historical jury of England, in respect to the number of twelve, or in respect to waiver, as the right of jury has been administered in English proceedings, is quite as hard and fast as the majority opinion assumes, and I incline to the belief that the English jurist of to-day would be greatly surprised to learn that a jury trial in a misdemeanor case is constitutionally and historically invalid because a juror had been removed from the panel by reason of sickness or death, occurring in the course of the trial, and where the defendant freely and intelligently exercised his right of waiver, and where the Crown and the accused, under the discretionary approval of the court, waived all objections and formally consented in writing that the trial should proceed, and where such a course was adopted as something in the just administration of the law in respect to the rights of the defendant and the rights of the Government as well.

To answer this suggestion, in the only way which appeared to be available, and to test the soundness of the conclusions they had deduced from their search of authorities, counsel for the respondent wrote to a firm of English solicitors, asking them to obtain an opinion on the subject from an eminent barrister in criminal practice, to be selected by the solicitors.

The opinion received in response to this request is of course not presented as an authority in the ordi-

nary sense. Counsel for the defendant procured it, however, in the endeavor to obtain all possible light on the question at issue, and now present it for such value as it may possess as cumulative evidence of the common law practice in relation to the number of jurors. The endeavor was made to secure the best advice obtainable,—advice not influenced by any attempt to support either side of the controversy.

The papers forwarded for submission to the barrister were as follows:—

STATEMENT OF FACTS AND QUESTIONS SUBMITTED.

STATEMENT OF FACTS.

A defendant indicted for an offence against the United States Banking Laws in the nature of embezzlement, punishable by from five to ten years' imprisonment, was put upon trial before a properly constituted Court with a jury of twelve men. Near the close of a very long trial one of the jurors was taken ill and was unable to sit further in the case. It was thereupon agreed by the prosecuting attorney in behalf of the United States, and by the defendant himself and his counsel, that the trial might proceed with the remaining eleven jurors with the same force and effect as if a juror had not been discharged. A written agreement to that effect was filed and was approved by the presiding Judge and the trial proceeded accordingly. A few days later another juror was discharged for a similar reason, and a similar agreement was filed, under which the trial proceeded with the remaining ten jurors. These ten jurors found the defendant guilty.

PURPOSE OF OUR INQUIRY.

On the foregoing facts the question is now raised, whether any judgment can lawfully be pronounced upon such a verdict, and in particular whether the proceeding was in conflict with

a clause of the United States Constitution which provides that "the trial of all crimes . . . shall be by jury." It being a well-established rule of construction in the United States Courts that common law terms used in the Constitution are to be understood in the sense which they bore in the English common law at the time of the adoption of the Constitution, it becomes a material question whether trial by jury, as understood and practised in criminal cases in England in the latter part of the eighteenth century, permitted or recognized such a reduction in the number of the jury. That is primarily a question to be answered by reference to English authorities, and we have made and are making a search of those authorities on this point. We find plenty of general expressions, to the effect that a jury must consist of twelve men, that a verdict must be the unanimous verdict of twelve, and the like, but so far as our search has proceeded we find a rather surprising absence of any reference to exactly such a situation as arose in the case we have stated. In other words, we find no specific reference whatever to the proper or customary procedure when one member of a jury died or was taken seriously ill in the course of a criminal trial. That situation has arisen in the Courts of nearly all our states. In some states it has been held that the trial might proceed by consent of both sides with eleven jurors and a lawful verdict be rendered; in other states the opposite decision has been reached; and it has been both contended and denied by learned judges in this country that the form of procedure above described is in accordance with English common law practice.* It has also been contended that on this point there is a distinction in English practice between felony and misdemeanor.

Under these circumstances, we desire to supplement our study of the English authorities and the history of jury trial by an inquiry as to present day understanding and practice in England, which would have a very evident bearing on the probable practice and understanding in 1789, when the United

*To be exact, the suggestion in the dissenting opinion in the case at bar is the only instance of this contention which counsel for the respondent have found.

States Constitution was adopted. We therefore desire to submit the following questions:—

QUESTIONS SUBMITTED.

1. Is it now customary or regarded as permissible in English criminal trials to discharge one or more jurors during the trial and accept a verdict from the remainder under any circumstances or in any class of cases?

2. If so, under what circumstances and in what classes of cases?

3. If such a practice exists, is it generally understood to be a practice of ancient or of modern origin, and if the latter, how recent is it and on what basis is it generally understood that the departure from the ancient practice is justified?

4. If no such practice exists at the present day, has it, so far as you know, ever existed, or is it the general understanding of the bar that in criminal trials a verdict by less than twelve has never under any circumstances been valid?

5. If the practice above referred to does not exist, what is the customary procedure when it develops in the course of a protracted criminal trial that one juror, from death, illness, or other cause, is unable to take any further part in the trial? Is a new jury impanelled and the trial begun again, or is the prisoner discharged? Is it your understanding that the modern practice on this point is the same which has always been followed?

Judging from the frequency with which such a situation has arisen in this country, we have assumed that the English practice under the same circumstances must long since have become so fixed and the understanding of the bar on the point so clear and definite that the foregoing questions can be readily answered in general terms by a barrister of experience in criminal trials. We appreciate that, if the answer to our first question were affirmative, complete and definite answers to the second and third questions might involve extensive research into the history of jury trial, and the same would be true of the lines of inquiry opened by our fourth question and the last clause of our fifth. While appreciating

the value of an opinion on all these points from an able and experienced English barrister based on thorough research, we are not authorized to incur the expense which the preparation of such an opinion would involve. We desire merely such answers to our questions as the experience of the barrister to whom they are submitted enables him to give without special research or examination of authorities. If, however, it should happen that he is familiar with English authorities dealing with the precise situation involved in our case, to which he could refer us without having to look the point up, we should be very grateful for the assistance which such a reference would afford us in our study of the English books.

The opinion received in answer to the foregoing questions is that of Mr. C. F. Gill, K. C., and is as follows:

OPINION.

1-3. Under no circumstances and in no class of cases is it now permissible in English criminal trials to discharge one or more jurors during the trial and accept a verdict from the remainder.

4. No such practice has ever existed, and it is the general understanding of the Bar that in criminal trials a verdict by less than twelve has never under any circumstances been valid.

5. The proper course to adopt in the event of the death or serious illness of a juryman during the course of a criminal trial has been considered by the English Courts in several cases. The jury should be discharged, and the prisoner tried *de novo* or another juryman may be added to the eleven, but in that case the prisoner should be offered his challenges over again as to the eleven and the eleven should be sworn *de novo*. See *R.* v. *Scalbert* (1794), 2 Leach, p. 620, and the earlier cases cited in the notes to that case: *R.* v. *Edwardes* (1812), R. & R., p. 224, *R.* v. *Beere*, 2 M. & R. (1843), p. 472, *R.* v. *Ashe* (1845), 1 Cox, p. 150.

It will be observed that in some of these cases, on the second

trial the Judge read over his note of the evidence given at the abortive trial to the witnesses and asked them if it was correct, but there is grave reason to doubt whether this course can properly be adopted even with the consent of the prisoner, and where the witnesses are submitted at the pleasure of Counsel on either side to fresh oral examination and cross-examination. See the judgment of Sir John Coleridge in *R.* v. *Bertrand* (1867), L. R. 1 P. C. pp. 534–6, in the course of which he says, "The most careful note must often fail to convey the evidence fully in some of its most important elements,—those for which the open oral examination of the witness in presence of prisoner, judge and jury is so justly prized. It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the prisoner when that has been important, upon the statement of anything of particular moment; nor could the judge properly take on him to supply any of these defects; who indeed will not necessarily be the same on both trials: it is, in short, or it may be the dead body of the evidence without its spirit: which is supplied when given openly and orally, by the ear and eye of those who receive it."

He also points out that it is a mistake to consider the question only with reference to the prisoner and that in the interests of the due administration of justice it is essential that no unnecessary difficulty should be thrown in the way of the jury understanding and rightly appreciating the evidence.

(Signed) CHARLES F. GILL,
3 Temple Gardens,
Temple.
London, E. C.

1ST DECEMBER, 1908.

Supreme Court of the United States.

UNITED STATES,
PETITIONER,

v.

JOHN W. DICKINSON,
RESPONDENT.

On Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

BRIEF FOR THE RESPONDENT.

STATEMENT OF FACTS.

The respondent Dickinson and one Foster were jointly indicted under section 5209 of the Revised Statutes, which is a part of the National Bank Act. The material portion of this section is as follows;—

> Every president, director, *cashier*, teller, clerk, or agent of any association, who embezzles, abstracts, or *wilfully misapplies* any of the moneys, funds, or credits of the association; . . . with intent, in either case, to injure or defraud the association . . . ; *and every person who with like intent aids or abets* any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

Foster, the principal defendant, was cashier of the South Danvers National Bank, and was charged with wilfully misapplying the funds of the bank, and Dickinson was charged with aiding and abetting. Both having been convicted, Dickinson sued out a writ of error, and after argument before the Circuit Court of Appeals for the First Circuit his conviction was held invalid by that court by reason of the fact that the verdict against him was found by only ten jurors. On a writ of *certiorari* issued on petition of the United States the case has been brought to this Court.

On the other questions raised by the writ of error and argued before the Circuit Court of Appeals, the decision of that court was adverse to the respondent.

The questions to be argued in this brief are those relating to

I. The jurisdiction of this Court.
II. The sufficiency of the indictment.
III. The validity of the verdict found by ten jurors.

The Indictment.

The indictment (Record, p. 2) contained fifteen counts, of which it ultimately appeared that the thirteenth and fourteenth were intended to charge the same offence. There were therefore fourteen separate offences charged. The dates alleged ranged from June 10, 1899, to May 14, 1900. Each count stated by way of inducement that the South Danvers National Bank was a duly organized na-

tional banking association under the laws of the United States, located and doing business at Peabody, in the District of Massachusetts, and had an account and credit with the Suffolk National Bank of Boston, and from time to time made deposits to the credit of its said account with the Suffolk Bank, and at all times charged its said account for moneys, funds, and credits paid and applied by the Suffolk Bank for the use of the South Danvers Bank; that George M. Foster was cashier of the South Danvers Bank; and as such assisted the said bank in the transaction of its banking business. Each count then charged in substance that the said George M. Foster on a designated date, without the knowledge and without the consent of the said South Danvers National Bank, did wilfully misapply a designated amount of the moneys, funds, and credits of the said bank, by unlawfully, etc., converting said moneys, funds, and credits to the use, benefit, and advantage of John W. Dickinson, with intent to injure and defraud the said bank. Each count further alleged in substance that the said John W. Dickinson on the same date, well knowing the premises, did unlawfully, etc., with intent to injure and defraud the said bank, aid and abet the said Foster to commit the said offence and crime of wilfully misapplying the said moneys, funds, and credits.

The description of the property misapplied in the first count was as follows:—

certain money of said The South Danvers National Bank, to the amount and of the value in all of three thousand five hundred and thirty-seven dollars and ninety-two cents, certain funds of said The South Danvers National Bank, to the amount

and of the value in all of three thousand five hundred and thirty seven dollars and ninety-two cents, said credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of three thousand five hundred and thirty-seven dollars and ninety-two cents, certain credits of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of three thousand five hundred and thirty-seven dollars and ninety-two cents, a certain credit of said The South Danvers National Bank, to the amount and of the value of three thousand five hundred and thirty-seven dollars and ninety-two cents, a certain credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston to the amount and of the value of three thousand five hundred and thirty-seven dollars and ninety-two cents, a more particular description of said money, funds, credit, and credits being to said jurors unknown (Record, p. 2).

The second count alleged the misapplication of certain money of said The South Danvers National Bank, to the amount and of the value in all of five thousand dollars, certain funds of said The South Danvers National Bank, to the amount and of the value in all of five thousand dollars, certain credits of said The South Danvers National Bank, to the amount and of the value in all of five thousand dollars, a more particular description of said money, funds and credits and of the values thereof being to said jurors unknown (Record, p. 5).

This latter form of description, except for the amount alleged, was exactly followed in the sixth, tenth, and fourteenth counts. The remaining counts, among which are the three on which the defendants were convicted, followed the same form as the first count.

Except for this difference, and the dates and amounts, all the counts were exactly alike.

The defendant Dickinson demurred to the indictment and to each and every count thereof, assigning numerous grounds of demurrer (Record, pp. 28 and 32). Those relied on before this Court are summarized below in connection with the argument on the sufficiency of the indictment. The demurrer was overruled (Record, p. 33), and a bill of exceptions to this ruling was duly allowed (Record, p. 39). The assignments of error based on the overruling of the demurrer are the first, second, and third (Record, pp. 150–152).

The Reduction of the Number of Jurors.

It appeared in the course of the trial that one of the jurors by reason of illness was unable to sit further, whereupon the following agreement was filed of record (Record, p. 37):—

> Whereas one of the jurors impanelled to try the above-entitled indictment is unable by reason of illness to further sit therein,
>
> Now, therefore, we consent and agree that the said juror, to wit, Charles F. Low, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining eleven jurors with the same force and effect as if said juror had not been discharged.
>
> JOHN W. DICKINSON,
> GEORGE M. FOSTER,
> UNITED STATES,
>
> *by* BOYD B. JONES,
> *Special Assistant U. S. Attorney.*

The court then proceeded with the trial with the remaining eleven jurors. On a subsequent day, the

trial being still unfinished, it appeared that a death had occurred in the family of one of the remaining jurors, and another agreement was filed of record, as follows (Record, p. 37):—

Whereas one of the jurors impanelled to try the above-entitled indictment is unable by reason of a death in his family to further sit therein,

Now, therefore, we consent and agree that the said juror, to wit, Edward E. Stockman, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining ten jurors with the same force and effect as if said juror had not been discharged.

JOHN W. DICKINSON,
GEORGE M. FOSTER,
BOYD B. JONES,
Special Assistant U. S. Attorney.

The trial then proceeded with the remaining ten jurors, who returned a verdict on March 20, 1903 (Record, p. 38). Both defendants were found guilty on the first, third, and fifteenth counts.

On March 23, 1905, judgment not having been pronounced, the defendant Dickinson filed the following motion in arrest of judgment (Record, p. 39):—

And now, after verdict against the said John W. Dickinson, and before sentence, comes the said John W. Dickinson, by his attorneys, and moves the court here to arrest judgment herein and not pronounce the same, because of manifest errors in the record appearing, to wit: Because the said verdict against the said John W. Dickinson was found by a so-called jury consisting of ten (10) jurors only, and not by a jury of twelve (12) jurors, as required by the Constitution and laws of the United States, and because no judgment against him, the said John W. Dickinson, can be lawfully rendered on said verdict.

POWERS & HALL,
Attorneys for the said Defendant.

This motion was overruled on August 10, 1906, and a bill of exceptions to this ruling was duly allowed on the same day (Record, p. 41).

Thereupon the defendant was sentenced by the court to nine years' imprisonment in the jail at Dedham (Record, p. 149).

The question of the validity of the verdict and of the judgment and sentence pronounced thereon is raised by the 53d and 54th assignments of error (Record, p. 159).

Assignments of Error not Relied on.

For the purposes of the argument before this Court the respondent waives all the assignments of error except the 1st, 2d, and 3d, relating to the indictment, and the 53d and 54th, relating to the validity of the verdict and the judgment thereon.

ARGUMENT.

I.

THE QUESTION OF JURISDICTION.

While there is no doubt of the power of this Court, under section 716 of the Revised Statutes, and independently of the Act of March 3, 1891, to issue writs of *certiorari* in proper cases, when the circumstances imperatively demand that form of interposition, to correct excesses of jurisdiction, and in the furtherance of justice (*Ex parte Chetwood*, 165 U. S. 443), it will hardly be argued that the present case is a proper one for the exercise of that extraor-

dinary power. In other words, it will be conceded that the question of jurisdiction must be decided by construction of the provisions of the Act of 1891.

Cf. *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 380.

The present argument will, therefore, be confined to a discussion of the intent and effect of that statute.

The Act of March 3, 1891 (26 Stat. 826; 1 U. S. Comp. Stat. 1901, p. 546), framed for the purpose of relieving the Supreme Court from the excessive burden imposed upon it by its increasingly crowded docket, established the Circuit Courts of Appeals, and assigned to those courts a considerable part of the appellate jurisdiction formerly exercised by the Supreme Court.

The general purpose of the statute has been described by this Court as follows:—

> The primary object of this act, well known as a matter of public history, manifest on the face of the act, and judicially declared in the leading cases under it, was to relieve this court of the overburden of cases and controversies, arising from the rapid growth of the country, and the steady increase of litigation; and, for the accomplishment of this object, to transfer a large part of its appellate jurisdiction to the Circuit Courts of Appeals thereby established in each judicial circuit, and to distribute between this court and those, according to the scheme of the act, the entire appellate jurisdiction from the Circuit and District Courts of the United States.

American Construction Co. v. *Jacksonville, T. & K. W. R. Co.* (above cited), at p. 382.

Section 6 of the Act, omitting certain portions not here material, is as follows:—

> The circuit courts of appeals . . . shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, . . . and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.
>
> . . . . . .
>
> And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

At the time when this Act was passed the only existing method by which a decision of the Supreme Court could be obtained on a question of law arising in a criminal case not capital was upon certificate of difference of opinion by the judges of the Circuit Court, under sections 651 and 697 of the Revised Statutes. In capital cases, by the Act of Feb. 6, 1889, c. 113, s. 6 (25 Stat. 656), the defendant was given the right to obtain a review in

this Court by writ of error. The Act of 1891 preserved this right (section 5), but superseded the existing statutory provisions as to a certificate of difference of opinion. It contains at least four provisions under which a decision in a criminal case not capital can be reviewed in an appellate court: *first*, the provision of section 6 granting appellate jurisdiction to the Circuit Court of Appeals in all cases not provided for in section 5; *second*, the provision of section 5 by which any case involving the construction or application of the Constitution of the United States can be taken directly from the Circuit or District Court to the Supreme Court by appeal or writ of error (that these two provisions are not mutually exclusive and that a criminal case not capital involving a constitutional question may be taken either to the Court of Appeals, or directly to this Court, is clear from *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 277, and *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397); *third*, the provision of section 6 permitting the Circuit Court of Appeals, in any case in which its decision is by that section made final, to certify to the Supreme Court particular questions or propositions of law concerning which it desires the instruction of that Court; *fourth*, the provision of section 6 by which any such case may be brought before this Court by writ of *certiorari* for review and determination upon all questions properly raised on the record.

The clause of section 5 which would undoubtedly be held to authorize direct appeals to this Court in criminal cases involving a constitutional question, makes no distinction in its language be-

tween civil and criminal cases, and no distinction as to the party who is aggrieved by the decision in the court below. Any limitation in the latter respect in criminal cases must be read into the statute wholly by implication. It was nevertheless held in

United States v. *Sanges*, 144 U. S. 310,

that the right of review given by that provision of section 5, so far as it relates to criminal cases, must be limited to review at the instance of the defendant after a decision in favor of the Government. This conclusion did not result from any question of the constitutional power of Congress to authorize an appeal by the Government, it being conceded that no constitutional provision would be violated by allowing the Government to obtain a review under the circumstances involved in that case. Neither was the decision based upon any words in the statute itself which could be held either to express or to imply any exception or limitation. It proceeded solely on the ground that, for reasons stated at length in the opinion, and notwithstanding the general language employed, it could not be fairly inferred that Congress intended to authorize a review in a criminal case of a decision in favor of the accused.

It cannot be doubted that under the authority of the *Sanges* case, and on the same grounds, the general provision of section 6 granting appellate jurisdiction to the Circuit Court of Appeals would be held subject to the same limitation.

The same question does not arise in connection

with the provision for a certificate by the Circuit Court of Appeals of questions on which the judges of that court desire instruction, since, for the reason just stated, a criminal case would not be before them unless the decision below had been in favor of the Government, and their own decision would not have been rendered when the right to certify was exercised.

The same question can arise, however, under the provision for review in this Court by *certiorari*, and is the question raised by the present case.

It appears, therefore, that of the four provisions of the Act of 1891 under which criminal cases, being included with civil cases in the general language of the several provisions, can be made the subject of review in an appellate court, there are three under which the question may arise whether such review can be had after a decision in favor of the defendant, or, to put it in another way, whether a decision in favor of the defendant can be reversed in an appellate court.

As to one of these three provisions, that question has been authoritatively answered in the negative. Under another it will undoubtedly be conceded that the answer would be the same. The question arises in the present case, under the third provision, and the respondent contends that it must necessarily receive the same answer. The merit of this contention evidently depends upon whether the grounds of the decision in the *Sanges* case are applicable to the same extent and with the same force to the case here presented.

It should be clearly understood that the respondent does not rely upon any constitutional objection

to the power of Congress to authorize the review by this court,—whether by writ of error, appeal, *certiorari*, or otherwise,—of a decision in favor of the accused in a criminal case on a question of law, where there has been no verdict of acquittal by a jury. The question is exactly the same as in the *Sanges* case, namely, whether from the general language used in the statute it can be presumed that Congress intended to confer such jurisdiction.

The *Sanges* case proceeded purely and simply on the ground which is thus summed up in the concluding paragraph of the opinion:—

> In none of the provisions of this act, defining the appellate jurisdiction, either of this court, or of the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States (p. 323).

This decision is reached after an elaborate examination both of the Federal legislation as to appellate jurisdiction in criminal cases, and of the authorities in England and in the United States relating to criminal appeals, in which the Court finds no precedent, without express statutory enactment, for any review of any judgment in favor of the accused. The considerations which thus furnish the sole ground for that decision are in every respect as fully applicable to the case at bar.

In the first place, there is nothing in the language in which the power to review by *certiorari* is con-

ferred, which distinguishes the two cases. Both statutory provisions are absolutely general in their language; both would unquestionably authorize the review of a decision in favor of the accused, if there were no grounds outside the words of the statute for a different construction. There is no more intimation in one than in the other of an intention to make the "serious and far-reaching innovation in the criminal jurisprudence of the United States" which review of such a decision would involve.

Neither is it material to the present question that the power of the Supreme Court to issue *certiorari* is not made conditional upon an application by either party, and that in issuing the writ the Court may technically be regarded as acting of its own motion. There is no more precedent in the common law, or the Federal statutes, for authority in an appellate court, acting of its own motion, to review a decision in favor of the defendant in a criminal case than there is for review of such a decision upon writ of error or in any other form of appellate procedure. The vital feature of the innovation which would have resulted from allowing the writ of error in the *Sanges* case consists in the fact that it would have permitted a decision in behalf of the defendant to be reopened and reversed by a higher court, not merely in the manner in which that result would have been reached.

It must be remembered that the question in the present case is simply whether Congress can be presumed to have intended a certain result. It is therefore the practical effect of the construction contended for that must be considered, and the

practical effect of the Government's contention would be, in every case in which the writ was issued, exactly the same as if the Government were allowed a writ of error.

Neither is it material that a writ of *certiorari* under the Act of 1891 is not issued as of course, but only in the discretion of the Court. The characteristic feature of the "innovation" referred to in the *Sanges* case would not consist in its allowing the Government to *demand* a review, but in its allowing the Government to *obtain* one. There is no reason to believe that the decision in the *Sanges* case would have been different if the statute had made the allowance of a writ of error in all cases within the terms of section 5 dependent upon the discretion of this Court.

Neither is it material that the decision of the Circuit Court of Appeals in the present case does not call for the immediate discharge of the defendant. It will hardly be contended that, if the Circuit Court had sustained the motion in arrest of judgment, it would have been consistent with the *Sanges* case to allow the Government a writ of error.

Neither is it material that under the provisions of the Act of 1891 this Court may issue its writ of *certiorari* before as well as after the decision in the Circuit Court of Appeals, and that the present case could, therefore, have been brought here by *certiorari* on the petition of the Government at any time before decision in the Court of Appeals was rendered. This may be conceded without touching the present question, since there is no innova-

tion in permitting the decision of a question of law raised by the defendant in a criminal case, but not yet decided in his favor, to be transferred to this Court at the request of the Government and without the consent of the defendant. Exactly that was done for nearly a century before the Act of 1891 was passed, in cases of certificate of difference of opinion between the judges of the Circuit Court,—a fact which supports and illustrates the point made above, that the "innovation in criminal procedure" referred to in the *Sanges* case must mean any procedure under which a decision once rendered in favor of the defendant could be reviewed and possibly reversed, it being no innovation and therefore no part of the ground of the decision that the jurisdiction of the appellate court was there formally invoked by the Government as of right.

Neither is it material that, as the Government urges with great emphasis in its brief, if this Court is without jurisdiction of the case at bar, "questions of gravity and importance to the whole people" may be decided by "a tribunal of inferior rank, the decisions of which as to these questions are or may be at variance with those of other courts in the country of the same rank, or even of this Court itself," and "the Government must abide by the result though erroneous." Exactly that possibility existed before the Act of 1891 was passed, there being no way whatever by which, in any criminal case, a decision once rendered by the Circuit or District Court could be taken to this Court for review at the instance of the Government. A similar situation exists to-day in nearly every State in the Union.

It is important to remember in this connection that the intent of Congress as expressed in the Act of 1891 must be judged without any reference to the recent remarkable development, in political and economic importance, of certain branches of the Federal criminal law. The temper of the public mind has lately been distinctly favorable to innovations in criminal jurisprudence in the direction of strengthening the arm of the Government, particularly in certain classes of prosecutions. Such conditions have found natural expression in such recent legislation as the Act of Congress which was before this Court in

Taylor v. *United States*, 207 U. S. 120.
United States v. *Bitty*, 208 U. S. 393.

These present conditions, however, are of no assistance in determining the intent of Congress in 1891. The arguments they furnish are properly addressed to the Congress of the present day, and not to this Court.

Finally any consideration of the question here raised must give full weight to the rule expressed as follows in

Cross v. *United States*, 145 U. S. 571, 574.

> We have, of course, no general authority to review, on error or appeal, the judgments of the Circuit Courts of the United States in cases within their criminal jurisdiction, or those of the Supreme Court of the District of Columbia or of the Territories; and when such jurisdiction is intended to be conferred, it should be done in clear and explicit language.

Had section 6 of the Act provided that all cases within that section might be taken from the Circuit Court of Appeals to this Court by writ of error or appeal, it would be clear under the decision in the

Sanges case that the provision could not be construed as permitting in a criminal case the review of a decision of the Circuit Court of Appeals in favor of the defendant.

In other words, such a provision would not be sufficient to show an intent on the part of Congress to make "a serious and far-reaching innovation in criminal jurisprudence." How, then, can such an intent be implied from the substitution in certain classes of cases, for the obvious purpose of diminishing the burdens of this Court, of a discretionary appellate jurisdiction in place of the obligatory jurisdiction which is given "in all other cases."

II.

THE DEMURRER TO THE INDICTMENT.

The first three assignments of error (Record, pp. 150–152) are based on the overruling of the respondent's demurrer to the indictment. The first and second assignments rely specifically on certain grounds of demurrer therein recited. The third assignment incorporates by reference all the grounds alleged in the original demurrer (which appears on pages 28 to 31 of the Record) and in the additional grounds of demurrer subsequently filed (Record, p. 32).

The objections made to the indictment, though repeated in various forms, are in substance as follows:—

(1) That it does not contain the necessary averments of fact to show how the alleged misapplica-

tions were made or that they were unlawful within the meaning of section 5209, and therefore does not fully and clearly charge the commission of any criminal offence. (See the 7th, 8th, 9th, 10th, 11th, and 12th grounds of demurrer; the first assignment of error, paragraphs *d*, *e*, *f*, and *g;* and the third assignment of error.)

(2) That the offence intended to be charged is not set forth with sufficient certainty to inform the accused of the nature and cause of the accusation. (See the first five grounds of demurrer and the two additional grounds of demurrer numbered 13th and 14th; the first assignment of error, paragraphs *a*, *b*, and *c;* the second and third assignments of error.)

The legal principles applicable to this branch of the case are familiar ones, over which there will be little controversy, the difficulty, if any, being in their application to the language of the indictment.

A. TWOFOLD PURPOSE OF AN INDICTMENT.

The fundamental principles relied on are that the indictment must allege specifically, and in the form of statements of fact, all the elements necessary to constitute the offence, and that the allegations must be sufficiently certain and definite to give the accused reasonable information of the charge against him. These principles are common to all pleading, but, in keeping with the general attitude of the law toward criminal prosecutions, are enforced with especial strictness in criminal cases.

The object of the indictment is twofold. As stated in

United States v. *Cruikshank*, 92 U. S. 542, 558, it is

> first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.

This twofold purpose is worthy of a moment's consideration.

A criminal indictment not only corresponds to a declaration in a civil suit, but it also has some of the elements of a special verdict. Under the Federal Constitution no man can be put upon trial for an infamous crime until twelve members of a grand jury have on their oaths found and reported that he has done that which the law makes criminal. But the grand jury, like the petit jury, are judges of fact, and not of law. It is not their function to construe the criminal statutes or to determine whether certain acts constitute a crime. "Facts are to be stated, not conclusions of law alone." They must find and report the acts in fact done, the intent, and, so far as material, the circumstances in fact existing. It is then for the court to determine the legal effect of these findings. If the facts found leave it in doubt whether or not a crime has been committed, the indictment is bad. It is no more the function of the court to draw inferences of

further facts than it is the function of the grand jury to draw conclusions of law. The indictment, therefore, like a special verdict, must contain express findings of all the facts necessary to constitute the offence, and to show not merely as a probable inference of fact, but as a necessary conclusion of law, that a crime has been committed.

The nature and scope of this requirement are clearly brought out in the following extracts from the opinions of this Court.

> With rare exceptions, offences consist of more than one ingredient, and in some cases of many, and the rule is universal that every ingredient of which the offence is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error.
>
> *United States* v. *Cook*, 17 Wall., 168, 174.

> The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offence must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication.
>
> *Pettibone* v. *United States*, 148 U. S. 197, 202.

> The statute upon which the indictment is founded only describes the general nature of the offence prohibited; and the indictment, in repeating its language without averments disclosing the particulars of the alleged offence, states no matters upon which issues could be framed for submission to a jury.
>
> *United States* v. *Hess*, 124 U. S. 483, 486.

> The indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—

that is to say, appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offence alleged.

United States v. *Cruikshank*, 92 U. S. 542, 559.

This function of the indictment as securing the citizen against prosecution for crime without a preliminary finding by twelve of his fellow-citizens that he has committed acts which the court can determine to be a crime, is distinct from its other equally important function as giving the accused reasonable notice of the charge which he must be prepared to meet. The former benefit was that intended to be secured by the provision of the Fifth Amendment, that no man shall be held to answer for an infamous crime unless on a presentment or indictment of a grand jury, and the latter by the provision of the Sixth Amendment, that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation.

Postponing for the moment further consideration of the rule as to the certainty with which the accused must be informed of the charge against him, we will examine more particularly the rule requiring findings of fact by the grand jury sufficient to show as a necessary conclusion of law the commission of a crime.

B. THE RULE REQUIRING DEFINITE ALLEGATIONS OF ALL FACTS NECESSARY TO CONSTITUTE A CRIME.

1. Application of the Rule to Statutory Offences.

It is evident that, to satisfy this rule, the findings of the indictment must be expressed in language accurate, definite, and unambiguous. In the case of common law crimes there are usually certain technical forms of expression uniformly used and always understood in an exact technical sense, which in combination make up a full, explicit, and definite description of the necessary acts and intent. Where a statute creating a new offence is expressed in similar language, including a full enumeration of the physical acts, the intent, and the circumstances necessary to constitute the offence, an indictment in the language of the statute will ordinarily be sufficient. But where, as is often the case, the language of the statute does not of itself absolutely define the limits of the offence, but requires to be construed in the light of the subject-matter, the evident purpose of the enactment, and other similar considerations, an indictment in the language of the statute would not satisfy the rule. The statute may leave some elements of the offence or some qualifications of the general language used to inference or construction. The indictment must be specific and definite in all such particulars. Any other rule would lead to hopeless confusion, since it is evident that considerations which might enable the court to determine without hesitation what the legislative body meant by certain ambiguous language

used in a statute, might have no bearing whatever on the probable meaning of the same language as used by a grand jury in an indictment. The rule has been stated by this Court as follows:—

> A rule of criminal pleading, which at one time obtained in some of the circuits, and perhaps received a qualified sanction from this court in *United States* v. *Mills*, 7 Pet. 138, that an indictment for a statutory misdemeanor is sufficient, if the offence be charged in the words of the statute, must, under more recent decisions, be limited to cases where the words of the statute themselves, as was said by this court in *United States* v. *Carll*, 105 U. S. 611, 612, "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." The crime must be charged with precision and certainty, and every ingredient of which it is composed must be accurately and clearly alleged. *United States* v. *Cook*, 17 Wall. 168, 174; *United States* v. *Cruikshank*, 92 U. S. 542, 558. "The fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." *United States* v. *Carll*, 105 U. S. 611.
>
> *Evans* v. *United States*, 153 U. S. 584, 587.

See to the same effect:—

Blitz v. *United States*, 153 U. S. 308.
Keck v. *United States*, 172 U. S. 434.
United States v. *Cruikshank*, 92 U.S. 542, 558.
United States v. *Hess*, 124 U. S. 483, 487.
Pettibone v. *United States*, 148 U. S. 197.
United States v. *Mann*, 95 U. S. 580.
United States v. *Carll*, 105 U. S. 611.

The difficulty may arise from the fact that the statute makes a conclusion of law part of the definition of the offence, as in the *Keck* case; or from the omission to express a limitation which the court by construction holds to have been implied, but within which the indictment must by express averment bring the act charged, as in the *Blitz* case; or from the fact that the statute, as said in the *Hess* case, "only describes the general nature of the offence," as by adopting as a test of criminality some quality or tendency of an act or device which involves an exercise of opinion. In such a case it necessarily follows that the indictment must so specifically describe the act or device that the court can determine whether the opinion is justified. Otherwise, the facts which the grand jury found, but did not specifically allege, may have been such as the court could say at once on a full statement of them would not justify the prosecution. In the language above quoted from the Cruikshank case,

> it must be made to appear—that is to say, appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offence alleged (p. 559).

2. Analysis of Section 5209.

The particular statute here in question may now be examined in order to determine, as preliminary to the application of the foregoing principles, what offence or offences are intended to be forbidden. Omitting certain portions not here material, the statute is as follows:—

> Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misap-

plies any of the moneys, funds, or credits of the association; . . . with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

The words "embezzle," "abstract," and "wilfully misapply" have all been construed by this Court. It is settled that they are not to be regarded as synonymous, but are distinct in their meaning and application.

United States v. *Northway*, 120 U. S. 327.

The word "embezzle" has an exact technical meaning as a description of a criminal act. It has been familiar to the law from early times, and has always meant the fraudulent appropriation of personal goods of another by one who already has lawful possession or at least physical custody.

4 Bl. Com., pp. 230-231, and note.
1 Wharton's Criminal Law, 9th ed., § 1009, *et seq.*

The following definition is found in

Moore v. *United States*, 160 U. S. 268, 269-270.

Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.

Accordingly, it was held in the *Northway* case that an indictment was sufficient which alleged in substance that the accused was president and agent of a national bank, and as such received into his possession certain of the moneys and funds of the bank, and, while they were in his possession as such president, wrongfully, unlawfully, and with intent to injure and defraud the bank did *embezzle* and convert to his own use the said moneys and funds.

It is evident from the above definition, and is recognized in all the cases, that the word "embezzle" can be applied only to tangible property of which the accused could have physical possession,—in general, personal property of a kind which could be the subject of larceny, or on the conversion of which an action of trover could be founded. All the other Federal statutes in which the word appears relate to property of that kind, and unquestionably use the term in its technical sense, involving possession by the offender. As used in section 5209, it is evidently so construed in the *Northway* case (p. 331).

The word "abstract," while not a word of art having a technical meaning in the law, is held in the *Northway* case to be a word of simple, popular meaning, without ambiguity, signifying "to take and withdraw from the possession and control of the bank the moneys and funds alleged to be so abstracted." In other words, in its ordinary and popular use it exactly and definitely describes the same act as the words "take and carry away" in an indictment for larceny; and the offence of abstracting money or securities under section 5209 is construed as differing from larceny only

because under the statute some other intent, such as the intent to deceive some officer of the association, may take the place of the *animus furandi*, which is an essential element of larceny. It was therefore held that a count of the indictment was sufficient which charged in substance that the defendant was president and agent of a national bank, and that he wilfully and unlawfully and with intent to injure the bank, and without its knowledge and consent, did *abstract* and convert to his own use certain moneys and funds of the association of an amount and value stated.

It is evident that the word "abstract," as thus construed, like the word "embezzle," can be applied only to tangible property of which the accused could take physical possession.

The words "wilfully misapply," being broader than either "embezzle" or "abstract," include within the prohibition of the statute offences to which neither of the other words can be applied. The statute relates to the misappropriation of "moneys, funds and credits." Moneys can of course be embezzled or abstracted, and it would seem a probable construction, which is supported by the use of the word in the cases, that "funds" is intended to describe securities which can be in the actual possession of the accused and stolen or embezzled. "Credits," however, unquestionably includes such intangible property rights as a deposit by the bank with another bank, or money due it from a depositor by reason of an overdraft, or any other bills or accounts payable, or indebtedness to the bank. It is evident, therefore, that the

word "misapply" was intended to include, not only such cases as those referred to in the *Northway* case on page 332, where an officer of the bank by reason of his control of its affairs directs the disposition of its money or funds without himself having or taking actual possession of them, but also all cases where the misappropriation is accomplished without transferring or dealing with money or funds of which physical possession can be had, as, for example, by drawing and negotiating a check against the account of the bank with another bank, by cancelling an indebtedness to the bank, or by some form of book-keeping entries, which makes some credit belonging to the bank available to some one else not lawfully entitled to it.

3. The Rule Expressly Laid Down for Indictments Charging Wilful Misapplication.

The word "misapply" is a broad and inclusive term, which has no settled technical meaning like the word "embezzle," and which is not in its popular sense a definite and unambiguous description of a physical act, like the word "abstract." It has therefore been held by this Court that it is not sufficient in an indictment under section 5209 to describe the act charged merely by the use of the word "misapply," a distinction being thus sharply drawn between that word and the words "embezzle" and "abstract." The leading case on the use of the word "misapply" is

United States v. *Britton*, 107 U. S. 655.

In that case the Court said (p. 669):—

> The words "wilfully misapplied" are, so far as we know, new in statutes creating offences, and they are not used in describing any offence at common law. They have no settled technical meaning like the word "embezzle," as used in the statutes, or the words "steal, take and carry away," as used at common law. They do not, therefore, of themselves fully and clearly set forth every element of the offence charged. It would not be sufficient simply to aver that the defendant "wilfully misapplied" the funds of the association. This is well settled by the authorities we have already cited. There must be averments to show how the application was made, and that it was an unlawful one.

Again in

Batchelor v. *United States*, 156 U. S. 426, 429,

it was said that the words "wilfuly misapply" must be supplemented by further averments "showing how the misapplication was made, and that it was an unlawful one."

These decisions are merely illustrations of the general principle above discussed, that the indictment must contain definite findings of fact, including the act, the intent, and, so far as material, the existing circumstances surrounding the act, such as to leave to the Court the determination of the question of law whether the facts found show, as a necessary legal conclusion, the commission of a crime.

The trouble with the word "misapply" is twofold. In the first place, apart from any limitations that may be imposed by construction of this particular statute, the description of any transaction with the moneys, funds, or credits of a bank as a

misapplication involves a conclusion of law, exactly as if the indictment used the equivalent expression, "wrongfully applied." In the second place, this Court has construed the statute as not intended to make criminal all transactions with the assets of the bank which might justly and properly be termed misapplications, and this construction is based, not upon any express limitation in the statute, but upon the inferences of the Court as to the probable intent and purpose of the legislation.

> *United States* v. *Britton*, 107 U. S. 655 (above cited).

For these reasons this Court has laid down the rule, as above stated, that the allegation of wilful misapplication "*must be supplemented by averments showing how the misapplication was made, and that it was an unlawful one.*" This must be taken as an authoritative statement of a test to which any indictment for "wilfully misapplying" must conform, and its plain meaning is that the indictment must show that a crime has been committed, not by an expression of the opinion of the grand jury as to the quality or effect of acts not specified, but by finding and alleging the specific acts done, so that the court can determine whether or not they constituted a violation of the statute.

4. Application to the Present Indictment.

The indictment in the present case must now be examined. Omitting the allegations as to the establishment of the bank, the position of the defendant

Foster as cashier, and other matters of inducement, the allegation of the intent, and the description of the property misapplied, each count of the indictment charges that Foster did on a certain date, "without the knowledge and without the consent of said The South Danvers National Bank, *wilfully misapply*" certain moneys, funds, and credits of the bank, "by then and there unlawfully, fraudulently, knowingly, wilfully, and designedly, without the knowledge and without the consent of the said The South Danvers National Bank, *converting said money, funds, credit, and credits and each thereof to the use, benefit, and advantage of John W. Dickinson* of Newton in said District of Massachusetts, thereby depriving said The South Danvers National Bank of the same, and of the use and benefit thereof," and that Dickinson aided and abetted in such misapplication. The sufficiency of the indictment as to Dickinson depends upon the sufficiency of the allegations as to Foster, and the only words which can be relied upon in the indictment as supplementing the allegation that Foster "wilfully misapplied" are the words "by converting . . . to the use, benefit and advantage of one John W. Dickinson, . . . thereby depriving said The South Danvers National Bank of the same and of the use and benefit thereof." It is the contention of the Government that these words are sufficient to make the indictment good, and this contention was rested, at the argument before the Circuit Court of Appeals, upon certain language of this Court in

Coffin v. *United States*, 156 U. S. 432, 449,

which is there quoted from the opinion in

United States v. *Britton*, 107 U. S. 655, 666 (above cited),

and also upon the decision of the Circuit Court of the United States for the First Circuit in

Jewett v. *United States*, 100 Fed. Rep. 832.

The language of the Court in the *Britton* and *Coffin* cases, on which the Government relied, is as follows:—

> Therefore, to constitute the offence of wilful misapplication there must be a conversion to his own use or to the use of some one else of the moneys and funds of the association by the party charged.

The actual decision in the *Coffin* case affords no assistance to the Government's contention, the indictment being sustained not because it alleged in terms that the accused converted the property of the bank to the use of some other person or corporation (there being no such allegation), but because it described in detail the acts done, the averments showing that the money of the bank was paid out to a designated person who was not entitled to receive it, and that by reason of the insolvency of the recipient the money was lost to the bank. To determine the meaning of the language quoted, reference must be made to the *Britton* case, in which that language was first used and in which there is a full discussion.

In the first place, it is evident from an examination of that opinion that the Court did not attach

special importance to the word "convert." In construing the statute and determining what classes of wilful misapplications were intended to be made criminal, the Court states practically the same proposition in four different ways, only once using the word "conversion."

On page 666 the Court says:—

> We think the wilful misapplication made an offence by this statute means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association. Therefore, to constitute the offence of wilful misapplication, there must be a conversion to his own use or the use of some one else of the moneys and funds of the association by the party charged.

After giving various illustrations of misapplications which would not be criminal, the proposition is again stated by way of conclusion, as follows (p. 668):—

> We are, therefore, of opinion that the wilful misapplication of the moneys and funds of the banking association, which is made an offence by sect. 5209, means something different from the acts of official maladministration referred to in sect. 5239, and it must be a wilful misapplication for the use or benefit of the party charged, or of some person or company other than the association, with intent to injure and defraud the association or some other body corporate or some natural person.
>
> As the counts under consideration, namely, count 77, and the similar counts down to and including count 96, do not show that the wilful misapplication therein alleged was made by the defendant for his own use, benefit, or advantage, but for the use of the association, we are of opinion that they do not allege an offence under sect. 5209 and are, therefore, insufficient and bad.

It is clear that the Court made no distinction between the phrase "conversion to his own use or the use of some one else" and the phrase "wilful misapplication for the use or benefit of the party charged or of some person or company other than the association." If, therefore, that case could be construed as meaning that an indictment is sufficient which charges misapplication "by converting to the use of" a designated person, it would be equally authority for the proposition that language would be sufficient charging merely that the defendant "wilfully misapplied to the use and benefit of" some person named.

It is evident from an examination of the opinion, however, that it is not authority for either proposition. To give it that effect would involve the erroneous assumption that there must necessarily be a single form of expression which will sufficiently describe in an indictment any form of misapplication intended to be forbidden by the statute. The Court was not attempting in the *Britton* case to construct any such universal formula for use in indictments. In seeking to determine whether certain acts specifically described in the indictment in that case were within the statute, it merely formulated one test of the criminality of an alleged misapplication. But it does not follow that the language used in stating this test, any more than the language of the statute itself, constitutes a full, accurate, and specific description of a particular criminal act. If it does not, an indictment in the language of the opinion is no better than an indictment in the language of the statute.

The question whether the present indictment is saved by the insertion of the words "to the use, benefit and advantage of John W. Dickinson" (postponing for the moment the question of any special virtue in the word "converting") is therefore not answered by what was said in construing the statute in the *Britton* case.

Considered more broadly, in the light of the established principles above discussed, that question must undoubtedly be answered in the negative.

In the first place, the addition of the words "to the use of Dickinson" does not necessarily limit the transactions to which the language of the indictment might be applied to those which are intended to be made criminal by the statute. The *Britton* case itself furnishes examples to illustrate this point. It is there pointed out that a loan to a single borrower in excess of ten per cent. of the capital stock of the bank, while it might be called a misapplication, would not be (provided of course there were no other wrongful element) a crime within this statute. But such a loan might nevertheless be described as a misapplication of the money lent to the use, benefit, and advantage of the borrower. Similar comment might be made on the other examples given,—a loan on security of the bank's own stock, or the purchase of land for purposes not authorized by law. Of course it is clear that, when the Court said that the misapplication must be "for the use or benefit of the party charged or of some person or company other than the association," it meant to imply a want of adequate consideration, or an intentional enrichment of the recipient at the

expense of the bank; and, so understood, the words used would not apply to the examples given of non-criminal misapplications. But, taken by themselves, the words "misapply to the use or benefit of another" do not clearly, necessarily, and without ambiguity denote what the connection makes it clear that they were intended to mean in the opinion. In an indictment, therefore, they do not, any more than "misapply" alone, necessarily show a criminal misapplication.

But if this were not so, the words "to the use, benefit and advantage of Dickinson" would not save the indictment. To satisfy the established rules, there must be averments showing "how the misapplication was made." To say that it was made for the use, benefit, and advantage of another does not meet this requirement. The words "to the use, benefit and advantage of Dickinson" do not necessarily mean more than that in the course of a transaction not described some money or property of the bank was paid or transferred to Dickinson. But if, in disregard of the rule that no essential element of the crime can be supplied by implication or intendment, they could be held to import further an improper enrichment of Dickinson at the expense of the bank, they would be, not a description of the act done from which the Court could determine its legality, but an expression of the opinion of the grand jury as to its tendency and effect. The indictment must state facts, and not opinions; it must allege the acts done, and not merely the tendency and effect as they appear to the jury. The indictment must show "how the misapplication was

made," and enable the Court to determine whether it had or could have the tendency and effect attributed to it, and whether under all the circumstances alleged it constituted a violation of the statute.

What has been said of the words "to the use, benefit and advantage of John W. Dickinson" is equally applicable to the words, which also appear in the indictment, "thereby depriving said The South Danvers National Bank of the same and of the use and benefit thereof." These words do not necessarily mean more than that in some way not described, which may have been lawful or unlawful, money or property of the bank passed out of its control. And however construed, they do not show "how the misapplication was made."

The Government's contention in support of the present indictment must therefore rest upon the use of the word "converting," either in itself or in connection with the words already discussed. It was the use of this word on which the Government chiefly relied at the argument before the Circuit Court of Appeals. The remaining question is therefore whether the word "converting" saves the indictment by furnishing a clear, exact, and specific description of the necessary criminal act; whether that word in the connection in which it is used shows "how the misapplication was made and that it was an unlawful one."

Undoubtedly, the phrase "converted to his own use" has a definite and settled technical meaning in the law, although it describes acts of more than one kind. Briefly, it may mean either an unauthorized taking possession of the personal goods of

another for one's own purposes, or an unauthorized dealing with the personal goods of another already in the possession of the one charged with the conversion, including in the latter sense a mere wrongful refusal to deliver on demand. In other words, so far as the act is concerned, as distinguished from the intent, it includes both such a taking as is found in larceny, and such an appropriation of property already in possession as is found in embezzlement. Whether this double meaning would render the use of the word an insufficient description of the criminal act, in an indictment which did not allege whether or not the accused had possession of the goods, it is not necessary to determine here, for the word as used in the present indictment cannot be construed in its technical common law sense.

In the first place, while the phrase "converted to his own use" is a technical expression with a technical meaning, the phrase "converted to the use of another" is modern and anomalous, and cannot be said to have a settled technical meaning in the law. To attempt to supply such a meaning by analogy of the accepted phrase is to undertake to do by inference what must be done by express and unambiguous statements.

But the most serious difficulty is that the word "convert," as a technical legal term, like "embezzle," or "take, steal, and carry away," or "abstract," can be applied only to tangible personal property of which actual possession can be taken or had. An examination of the present indictment shows that the word "converting" is not there used in any sense limited to such property.

The three counts on which the defendant was convicted, which are the three counts here material, are exactly alike except in the allegations of date and amount. Each of them as a part of the inducement alleges, with some care and detail, that the South Danvers National Bank had an account and credit with the Suffolk National Bank of Boston, and from time to time made deposits to the credit of its said account, and charged its said account for moneys, funds, and credits paid and applied by the Suffolk Bank for the use and purposes of the South Danvers Bank. The description of the property misapplied in the first count, which may be taken as an example, was as follows:—

certain money of said The South Danvers National Bank, to the amount and of the value in all of three thousand five hundred and thirty-seven dollars and ninety-two cents,
certain funds of said The South Danvers National Bank, to the amount and of the value in all of three thousand five hundred and thirty-seven dollars and ninety-two cents,
said credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of three thousand five hundred and thirty-seven dollars and ninety-two cents,
certain credits of said The South Danvers National Bank with said The Suffolk National Bank of Boston, to the amount and of the value in all of three thousand five hundred and thirty-seven dollars and ninety-two cents,
a certain credit of said The South Danvers National Bank, to the amount and of the value of three thousand five hundred and thirty-seven dollars and ninety-two cents,
a certain credit of said The South Danvers National Bank with said The Suffolk National Bank of Boston to the amount and of the value of three thousand five hundred and thirty-seven dollars and ninety-two cents,

a more particular description of said money, funds, credit and credits being to said jurors unknown.

The count alleges that the property thus described was misapplied "by converting said money, funds, credit and credits and each thereof" to the use of Dickinson. The word "converting" as thus used must necessarily be taken in a sense which is applicable to credits as well as to money and funds. As the word "convert" in its technical sense can be applied only to personal goods, of which possession can be taken or had,—property of the kind for which an action of trover could be maintained,—it cannot be construed in that sense here, for in that sense there can be no such thing as the conversion of a credit.

Since the word cannot be understood in the only sense in which it has any accurate or settled meaning, either in the law or in common usage, it remains wholly a matter of conjecture what meaning the grand jury attached to it, and it adds nothing whatever to the word "misapply." In any sense which can be given it, the whole expression "by converting to the use of Dickinson" has exactly the same defects as the words "wilfully misapplied." It does not specify the act, but merely characterizes it. In the connection in which it is used the expression will not bear any construction which would make it a full, exact, and definite description of a criminal act,—an averment showing "how the misapplication was made," from which the Court could determine as a necessary conclusion of law that it was a criminal one.

The case of

Jewett v. *United States*, 100 Fed. Rep. 832,

on which the Government relies, and in which special importance was apparently attached to the word "convert," contains nothing sufficient to answer the foregoing contentions. The material part of the opinion in that case is brief, and may be quoted in full (pp. 837–838):—

Count 84 is based on that provision of section 5209 of the Revised Statutes which reaches an officer or agent of an association who willfully misapplies assets. *Batchelor* v. *U. S.*, 156 U. S. 426, 429, 15 Sup. Ct. 446, 39 L. Ed. 478, repeats emphatically the rule that these words have no settled technical meaning, like "embezzle," also found in the same section, so that they must be supplemented by further averments showing wherein the misapplication was unlawful. But the count in question alleges that the accused did unlawfully, fraudulently, and willfully misapply and convert to his own use the assets of the bank, with intent then and thereby to injure and defraud the association. Then follows the allegation that this conversion was done by some means and in some manner to the jurors unknown. But, having alleged that the accused had unlawfully, fraudulently, and willfully misapplied and converted to his own use the assets of the bank, with intent to injure and defraud the association, no further allegation as to the means or manner was required. What was alleged would clearly have amounted to a charge of embezzlement at common law if the assets had been in Jewett's personal possession, and the allegation that Jewett did convert to his own use shows how the misapplication was made, and that it was an unlawful one, within the requirements of *Batchelor* v. *U. S.* Certainly it cannot be held that an allegation of all the elements which would constitute embezzlement, in the technical sense of the word, if charged against a person who had possession, is not a sufficient allegation of an unlawful misapplication, and of the means of misapplication. We may

therefore reject as surplusage the additional allegation to which the accused objects.

It is not clear from this opinion whether the indictment related only to tangible property, or whether it included credits. If it related only to tangible property, the decision of the Circuit Court of Appeals may perhaps be justified on the ground that the word "convert" could fairly be understood in its technical sense, and therefore alleged either a wrongful taking possession or a wrongful use of property already in possession,—that is, either an abstraction or an embezzlement; though it is submitted that the propriety of such a decision would be open to grave doubt. It might well be argued that the grand jury must not merely use language which describes either an embezzlement or an abstraction, but must allege explicitly that one offence or the other has been committed. However that may be, if the above is the meaning of the decision, it has no application to the present case.

If the indictment in that case referred to credits, the decision clearly cannot be supported merely on the ground that the indictment reads very much like an indictment for embezzlement, the difficulty being, as already pointed out, that the technical meaning of the word "convert," as frequently used in connection with the word "embezzle" in an indictment for embezzlement, cannot possibly be attributed to it in an indictment for the misapplication of credits. It may be added that in no case in which this Court has passed upon an indictment under section 5209 has any special impor-

tance been attached to the use in the indictment of the word "convert"; that no indictment for "wilfully misapplying" has been sustained by this Court which did not go on to allege in detail the acts done which the grand jury characterized as a misapplication; and that one indictment in which the words "converted to his own use" were used has been held by this Court insufficient. This was in

Batchelor v. *United States*, 156 U. S. 426.

In that case the indictment attempted to describe the transactions charged as misapplications, but the Court found the allegations so uncertain and vague that nothing definite could be gathered from them. If the Government's present contention were sound, however, these allegations might have been rejected as surplusage, and left in the indictment every material averment which is found in the present indictment, including the averment that the accused wilfully misapplied $40,422.79 of the moneys, funds, and credits of the bank, and converted them then and there to the use, benefit, and advantage of said Harry F. Batchelor (the accused).

The case of

Evans v. *United States*, 153 U. S. 584,

on which the Government relies, furnishes no authority in support of the present indictment. In that case the indictment stated specifically how the misapplication was made, and the decision was that, having fully described an act by which the bank was made to part with its property without consideration, and having alleged an intent to de-

fraud, the indictment need not expressly enumerate and deny every *honest motive* for the act which might be suggested. In the present case the sufficiency of the allegation of a dishonest purpose is not questioned, nor is it of any importance whether the word "converting" suggests such a purpose. It is the statement of the act, not the averment of the intent, that is defective.

To sum up the foregoing argument, it appears from an examination of the indictment that it attempts to define the criminal act in the words of the statute as a wilful misapplication; that the word "converting" in the connection in which it is used adds nothing to the word "misapply"; that the words "to the use, benefit and advantage of Dickinson" do not necessarily and specifically allege more than that certain money or funds or credits of the bank were, in the course of some transaction not described, transferred to Dickinson; that there is no description of how the misapplication was made from which the Court can determine whether or not it was a criminal misapplication; that the indictment merely expresses the opinion of the grand jury on the effect of the transaction, which includes an opinion on a question of law; in short, that there is no distinct and explicit finding of facts from which the Court can say, as a necessary conclusion of law, that the acts which the grand jury found to have been committed constitute a crime.

Such an indictment fails to comply with the rule expressly and deliberately enunciated by this court for indictments charging wilful misapplication; it violates principles many times clearly and

emphatically stated by this court, and it is difficult to see how a decision holding it sufficient could be reconciled on any logical ground with such former decisions as

United States v. *Cruikshank*, 92 U. S. 542.
United States v. *Mann*, 95 U. S. 580.
United States v. *Hess*, 124 U. S. 483.
Keck v. *United States*, 172 U. S. 434.
Batchelor v. *United States*, 156 U. S. 426.

C. THE RULE REQUIRING THAT THE OFFENCE BE CHARGED WITH SUFFICIENT CERTAINTY TO INFORM THE ACCUSED OF THE NATURE AND GROUNDS OF THE CHARGE AGAINST HIM.

As already pointed out, the indictment has a twofold function, and must not only show clearly and definitely that the grand jury has found an act to have been committed, which, if proved as alleged, would constitute a crime, but must also, in the language above quoted from

United States v. *Cruikshank*, 92 U. S. 542, 558,

"furnish the accused with such a description of the charge against him as will enable him to make his defence." The insufficiency of the allegations in the present case will now be considered from the standpoint of this latter function of the indictment.

The rule requiring for the information of the accused a reasonable certainty in the averments of an indictment was an established rule of the common law, and was deemed of sufficient importance to be incorporated in the Sixth Amendment of the Con-

stitution in the provision that "the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." This provision has been construed by this Court, in accordance with the principles of the common law, as requiring that the indictment must set forth the offence "with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged."

United States v. *Cruikshank*, 92 U. S. 542, 558.

In the same case the rule is further defined as follows (p. 558):—

> Where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars.

Again on the same page,

> A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances.

Other cases explaining or illustrating this familiar principle are:—

United States v. *Simmons*, 96 U. S. 360.
United States v. *Hess*, 124 U. S. 483.
Batchelor v. *United States*, 156 U. S. 426, 429.

The rule, as the above decisions show, applies equally to common law and statutory offences.

It is evident that this requirement as to certainty for the information of the accused will frequently be violated by the same want of specific allegations in an indictment which constitutes a violation of the other

rule requiring definite averments of facts sufficient to constitute a crime; but the rule now under consideration goes further, and requires, whenever possible, the specification of various particulars of description and identification which might not be necessary to the complete statement of a crime. Thus in

United States v. *Simmons* (above cited),

it was held that an indictment for causing and procuring another person to use a still, boiler, and other vessels in violation of a Federal statute was defective for failure to allege the name of such other person.

This rule as to particularity admits of some modification where the indictment expressly states that the grand jurors are unable to determine the particulars in question. Thus at common law an indictment for larceny must name the owner of the property stolen, but this may be dispensed with if the indictment states that this particular is to the grand jurors unknown. It was intimated in the *Simmons* case that the failure to give the name of the person who used the still by procurement of the accused might have been cured by a similar averment. Indictments under section 5209 have been held sufficient which alleged an intent to defraud some person to the grand jurors unknown.

This exception, however, relates only to mere details of description or identification not essential to a complete and specific statement of the offence intended to be charged.

1 Bishop, New Crim. Proc., sect. 547.

In the present indictment there is no particular description of the moneys, funds, and credits alleged to have been misapplied, nothing being stated by way of identification except the amount. No importance can be attached to the statement of the amount, since it seems to be well settled that allegations of amount and value are not binding, and that the Government may prove another amount than that alleged.

> *Commonwealth* v. *Hussey*, 111 Mass. 432.
> Archbold, Crim. Pl. (23d ed.), 300.

That point need not be further examined, however. The decision in

> *Moore* v. *United States*, 160 U. S. 268, 274–276,

is sufficient to show that the description in the present indictment of the property misapplied is fatally defective, unless the defect is cured by the averment that a more particular description was to the grand jurors unknown.

No satisfactory authority has been found for holding an averment of ignorance on so important a part of the description of the offence sufficient to save the indictment.

It is not necessary, however, to determine this question, since there is a fatal want of certainty in the indictment in another particular, still more important than the description of the property misapplied, and as to which there is no averment of ignorance on the part of the grand jury. The absence of any averments showing how the alleged misapplication was made, has already been dis-

cussed under the preceding heading of the argument. Such averments are not only required by the principles there discussed, but are equally essential to apprise the accused with reasonable certainty of the crime with which he stands charged.

It has been expressly held in cases already cited that the words "wilfully misapply," used in an indictment under section 5209, are insufficient without further averments showing how the alleged misapplication was made. In the *Britton* case, cited and discussed above, this decision was rested chiefly on the ground that those words alone do not necessarily charge a criminal misapplication.

In

Batchelor v. *United States*, 156 U. S. 426,

the statement to the same effect, namely, that the words "wilfully misapply" must be supplemented by further averments showing how the misapplication was made, is rested on the following ground (p. 429):—

> Without such averments there is no sufficient description of the exact offence with which the defendant is charged so as to enable him to defend himself against it, or to plead an acquittal or conviction in bar of a future prosecution for the same cause.

In other words, such an indictment does not inform the accused with the certainty required by law of the nature and grounds of the accusation he is called upon to meet.

Here, as under the preceding head of the argument, the only words in the indictment which can be relied upon as curing the defect are the words

"by converting to the use of Dickinson." For the reasons stated above the word "converting" as thus used cannot be construed in any exact or technical sense. It must be understood in some sense which would be applicable to the misapplication of credits, and no fixed and settled meaning can be attached to it in such a connection. What the grand jury meant by it is therefore wholly a matter of inference and conjecture, and it adds nothing whatever of certainty or definiteness to the charge "wilfully misapplied to the use of Dickinson."

It was also pointed out above that the words "to the use of Dickinson" do not necessarily mean more than that the transaction on which the indictment is founded involved some payment of money or transfer of funds or credits from the bank to Dickinson. This leaves the defendant almost as completely in the dark as to the act intended to be charged as a crime as would the words "wilfully misapply" alone.

In

United States v. *Hess*, 124 U. S. 483 (above cited),

the indictment was under section 5480 of the Revised Statutes, which makes it an offence, "having devised or intending to devise any scheme or artifice to defraud," to place any letter or packet in a United States post-office or take or receive any therefrom in the execution of such scheme or artifice. It was held that, "as a foundation for the charge, a scheme or artifice to defraud must be

stated, which the accused either devised or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial." The necessity for a statement of the particulars of an alleged wilful misapplication under section 5209 is certainly at least as great as the necessity for a particular description of the scheme or artifice to defraud under section 5480. But authority directly in point is furnished by the decision in

United States v. *Batchelor*, 156 U. S. 426 (above cited),

and the language of the court in that case quoted above on page 50. The indictment in the Batchelor case at least made some attempt to give an account of the transactions in which the criminal misapplication was charged to have taken place. That indictment contained everything in the way of particulars which the present indictment contains, and in addition gave to the defendant some information, though vaguely and imperfectly stated, to identify the transactions referred to, while the indictment in the present case gives none whatever.

The nature of the offence created by section 5209 is such as to give particular force and application to the rule requiring certainty in the indictment. In the ordinary course of the business of a national bank a great variety of transactions of different kinds, in which money, funds, or credits of the bank are paid or transferred to some other person or made available for his use, take place between

the bank and those with whom, in one capacity or another, it does business. There is scarcely any such transaction, however regular, which might not, by reason of some element present, or suspected or believed to have been present in it, assume in the eyes of a grand jury the character of a criminal misapplication. The cashing of checks, the discounting of notes, the loaning of money, the purchase of securities or other property, or almost any other business transaction, may be the subject of such a charge, and whether any such transaction possesses the elements necessary to make it criminal depends upon such matters as the intent of the parties, the purpose of the transaction, the solvency of persons with whom the bank is dealing, the value of securities, the knowledge of the bank officers on these points,—all matters on which suspicion may be easily aroused and opinions may easily differ. The plainest justice requires that in an indictment under a statute of this character the defendant shall be given some adequate information as to the particular transaction to which the grand jury has attributed a criminal character and the circumstances relied on as giving it that character.

In this respect the indictment in the case at bar could hardly be more completely deficient. Disregarding the allegations of date and amount, as allegations which need not be proved as laid, and disregarding also an immaterial difference between the two forms of expression which in different counts are made to serve for a description of the property misapplied, there is nothing to distinguish one count from another; and in none of them is

there anything to indicate what sort of transaction between Dickinson and the bank the grand jury has seen fit to characterize as a misapplication to Dickinson's use. Any one of the various forms of everyday transactions above referred to might be proved under any count of this indictment, just as appropriately as any other form of transaction. Disregarding entirely any distinction between specific statement and intendment or inference, and giving the fullest effect to all possible implications, no man, lawyer or layman, can from a reading of the indictment form even a conjecture as to what was intended to be charged, except that it was some transaction between Dickinson and the bank, which in the opinion of the grand jury benefited Dickinson improperly, and in which they believed that the parties had a dishonest intent.

Surely, so indefinite a charge cannot be held to be a full compliance with the rule so often enforced by this Court, that the indictment must set forth the offence with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged, and with reasonable particularity of time, place, and circumstances,—a rule incorporated in the Constitution for the more certain protection of citizens accused of crime.

III.

THE VALIDITY OF THE VERDICT FOUND BY TEN JURORS.

The question raised by the last two assignments of error is, in a word, whether in a criminal prosecution under Section 5209 of the Revised Statutes a judgment can legally be entered upon a verdict of guilty found by ten jurors, the defendant having pleaded not guilty and gone to trial before a jury of twelve, but having subsequently consented in writing to the discharge of two of the jurors.

The contention of the defendant on this branch of the case, which was sustained by the judgment of the Circuit Court of Appeals, is based upon the following provision of Article III, section 2, paragraph 3 of the United States Constitution.

> *The trial of all crimes,* except in cases of impeachment, *shall be by jury;* and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

A. PROPOSITIONS ESTABLISHED BY DECISIONS OF THIS COURT.

This provision has already been several times passed upon by this Court, and, except that its boundaries in one direction have not yet been drawn with mathematical precision, its true construction is not now in any important particular an open question. It will greatly assist the discussion of the

arguments advanced by the Government in attacking the decision of the Circuit Court of Appeals, to examine first the propositions which have already been established by the decisions of this Court, and which must therefore be accepted by both sides as the basis of any further discussion. These propositions are believed to be as follows:—

1. The provision of Article III above quoted is not merely the guaranty of a privilege personal to the accused, but is a part of the frame of Government, and as such an imperative definition of the only method by which the offences within its terms may be tried under the authority of the United States.

2. The trial by jury, which the Constitution requires, is the common law trial by a jury of twelve.

3. While there is a class of petty offences which are not to be regarded as within the scope of this provision, its application is not confined to felonies, nor to offences punishable by confinement in the penitentiary, and includes those classes of misdemeanors which, by reason of the nature of the offence and the amount of the punishment prescribed, must be classed as serious rather than petty offences.

The cases which establish these propositions will now be examined.

1. Article III a Peremptory Requirement of the Frame of Government.

The distinction between a guaranty of a personal right and what is called in

Schick v. *United States*, 195 U. S. 65, 72,

a constitutional or statutory mandate, is familiar to our jurisprudence and has frequently been recognized by this Court. Many of the constitutional requirements, both for civil and for criminal proceedings, are by established construction intended merely to secure to the individual a personal privilege, which he may enjoy if he chooses to insist upon it, and which he may equally dispense with. Most of the rights secured by the Sixth Amendment are of this character, as, for example, the right to a speedy and public trial, the right to an impartial jury, and the right of the accused to be confronted with the witnesses against him and to have the assistance of counsel for his defence. The same is true of the right of trial by jury given by the Seventh Amendment in civil cases at common law. On the other hand, certain requirements of criminal procedure, whether expressly enjoined by the Constitution or by statute, or founded merely upon the common law, are held to be peremptory in their character, and binding alike upon the parties, the courts and the officers of the law; and compliance with them is essential to the jurisdiction of the court and the validity of the proceeding. Such, for example, is the requirement of the Fifth Amendment, that no person shall be held to answer for an infamous crime unless on the presentment or indictment of a grand jury. In

Ex parte Bain, 121 U. S. 1,

where the question involved was the validity of an indictment amended by the prosecuting officer with the consent of the court, and without any objecton

on the part of the defendant, this Court declared that an indictment found by the grand jury

> was indispensable to the power of the court to try the petitioner for the crime of which he was charged;

that, after the amendment of the indictment, all jurisdiction of the offence was gone, and that the prisoner, who had been convicted, was entitled to his release on *habeas corpus*.

See to the same effect

Ex parte McCluskey, 40 Fed. 71,

and a full collection of authorities in *Ex parte Bain*, supra.

Again in

Hopt v. *Utah*, 110 U. S. 574,

a statutory requirement that the accused be personally present at all stages of his trial was held to be of the same character, the Court holding that

> It was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. . . . If he be deprived of his life or liberty without being so present such deprivation would be without that due process of law required by the Constitution.

A common law requirement, the observance of which is similarly held to be indispensable to the jurisdiction of the court, is the requirement that the accused shall be arraigned or plead to the indictment.

Crain v. *United States*, 162 U. S. 625.

An example of the other class of provisions is furnished by

Bank of Columbia v. *Okely*, 4 Wheat., 235, 244.

That case involved the validity of a statute of Maryland, which had become a part of the law of the District of Columbia, providing for the summary collection of negotiable paper made or endorsed to the bank, with a further provision for trial by jury at the request of the defendant. In holding the statute to be valid, the Court said:—

> That this view of the subject is giving full effect to the Seventh Amendment of the Constitution is not only deducible from the general intent, but from the express wording of the article referred to. Had the terms been that "the *trial* by jury shall be preserved," it might have been contended that they were imperative, and could not be dispensed with. But the words are, that the *right* of trial by jury shall be preserved, which places it on the foot of a *lex pro se introducta*, and the benefit of it may therefore be relinquished.

That the provision of Article III as to trial by jury belongs to the class of peremptory requirements, and not to the class of personal guaranties, is well settled by authority; and the nature of the requirement, its place in the Constitution and the language in which it is expressed, all justify and enforce the conclusion.

The first authoritative determination of the question is found in

Thompson v. *Utah*, 170 U. S. 343.

The defendant in that case was charged with an offence committed while Utah was still a territory,

and was tried after Utah became a state before eight jurors under a provision of the Utah Constitution authorizing such trial. His conviction was held void by this Court on the following grounds (p. 355):—

> In our opinion the provision in the Constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the territory became a state, because, in respect of such crimes, the Constitution of the United States gave the accused, at the time of the commission of his offence, the right to be tried by a jury of twelve persons, *and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury.*

On page 353 the Court says:—

> It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons.

After quoting from

Hopt v. *Utah*, 110 U. S. 574,

the Court proceeds (near the bottom of p. 354):—

> If one under trial for a felony the punishment of which is confinement in a penitentiary could not legally consent that the trial proceed in his absence, still less could he assent to be deprived of his liberty by a tribunal not authorized by law to determine his guilt.

The peremptory character of this provision of the Constitution had been discussed by Judge Story some sixty years earlier in the Circuit Court case of

United States v. *Gibert*, 2 Sumner, 19.

The question in that case was whether it was error after the accused had pleaded not guilty to omit the ancient inquiry how he should be tried. The omission was held immaterial on the following ground (p. 69):—

> I am clearly of opinion, that the form is wholly unnecessary under the constitution and laws of the United States, in the federal courts. The constitution has expressly declared, "that the trial of all crimes except in cases of impeachment shall be by jury." It is imperative upon the courts, and prisoners can be lawfully tried in no other manner.

On page 71 the court says:—

> And if the prisoners had refused to consent, the trial must have been in the same manner precisely as it has been had. But I confess for one, that I deem it little short of an absurdity in the courts of the United States to call upon the prisoners, after they have pleaded not guilty, to say how they will be tried, when the constitution and laws have peremptorily required the trial to be by jury. Suppose the prisoners had been asked, how they would be tried, and they had answered that they wished for no trial at all; must not the Court have proceeded to try them upon the plea of not guilty? Suppose they had answered that they wished to be tried by the Court, could the Court have tried the cause otherwise than by jury? Suppose they had been silent as to how, and when, and whether, they should be tried, could the Court have done otherwise than order a trial by jury?

And again on pages 71-72,—

> The constitution decides how he shall be tried independently of any election on his part.

In a series of lectures on the Constitution delivered in 1889 and 1890 by Mr. Justice Miller and published shortly after his death, the proposition is stated as follows:—

> You will see that the paragraph in Article III, above quoted, differs in its language from that which we have already considered in regard to trial by jury in civil cases as prescribed by Article VII of the Amendments. In the latter Article it is the mere right to demand the trial by jury which is guaranteed, and the parties may waive that right either by express agreement or by failing to demand a jury, while the language used in Article III is peremptory that "the trial of all crimes, except in cases of impeachment, *shall* be by jury." This language excludes all other modes, whether with or without the consent of the party.

Miller on the Constitution, pp. 499–500.

The principle received passing recognition in the comparatively recent case of

Queenan v. *Oklahoma*, 190 U. S. 488, 551.

In that case it appeared in the course of the trial that one of the jurors had been convicted of an offence which the Court assumed would on challenge have disqualified the juror from serving. In this connection the opinion of this Court contains the following significant though incidental statement:—

> The Court asked the counsel for the prisoner what they desired to do, and its intimation indicated that if the objection was pressed the juror would be excused. *This, of course, meant that the trial would have to be begun over again.*

In the latest case on the subject,

Schick v. *United States*, 195 U. S. 65,

the character of the requirement of jury trial in Article III as a "constitutional mandate" is expressly recognized, and the waiver of jury trial in that case is upheld only on the ground that the offence in question was not within the terms of Article III.

The peremptory character of Article III appears to be fully established by the authorities, and was not directly questioned by the Government in the argument before the Circuit Court of Appeals, but the attempt was made to construe the additional and supplementary provisions of the Sixth Amendment as substituted for and virtually repealing the constitutional enactment in the Third Article. On page ~~36~~ 38 of the brief filed by the Government in this Court the same idea seems to be suggested. A brief consideration of the relations between the two provisions is therefore necessary to a full discussion of the subject.

The Sixth Amendment is as follows:—

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The following discussion of the character and purpose of this provision is taken from the opinion of the Circuit Court of Appeals in this case (Record, pp. 175–176):—

> The United States press on us that the Amendments Articles V. and VI. modify, on the question we are considering, Article

III. of the Constitution as originally adopted. We find no authority in support of this proposition. The Amendments, as we have said, touch some matters which, by their very nature, are of such a character that a person accused may waive them. They also include other matters which, by their very nature, cannot be waived; as, for example, the requirement of an investigation by a Grand Jury with regard to infamous crimes seems to be settled in *Callan* v. *Wilson*, 127 U. S. 540. This requirement, like those of Article III. directing a jury and fixing the place of trial, relates to the frame of government, and therefore it is not subject to the control of the parties. The only expressions we find in the decisions of the Supreme Court relating to this subtopic are in *Schick* v. *United States*, 195 U. S. 65, 68, and in *Callan* v. *Wilson*, at page 549. *Schick* v. *United States* determines nothing, because it merely says that, "if there be any conflict" between the Amendments and the Constitution as originally adopted, "the Amendments must control" under the well understood rule that "the last expression of the will of the law maker prevails." On the other hand, the opinion in *Callan* v. *Wilson* states definitively that "there is no necessary conflict."

The observations in the opinions of the Supreme Court seem to be in complete harmony with the generally accepted rule, to the effect that, while the original Constitution relates to the frame of government, the Amendments are in the nature of a "Bill of Rights," which, of course, is understood to be in the interest of the citizen or subject, and, therefore, *prima facie*, more or less under his control and subject to waiver. The Amendments are described in the first edition of Story's Commentaries on the Constitution, § 1776, and in the third edition of the same work at §§ 303 and 1857, and in Cooley's Constitutional Limitations, 7th ed., at page 365, as a "Bill of Rights." Story points out that the Constitution was not supposed to contain any bill of rights, and that no objection to it was proclaimed with more zeal, and pressed with more effect, than the want thereof. The Growth of the Constitution, by Meigs (1900), which, so far as we have examined it, appears to be correctly stated, and which is a convenient handbook with refer-

ence to the work of the Constitutional Convention, points out at pages 250 and 314 that the Constitution as originally adopted contained no bill of rights, and that the Convention being divided on the question, all attempts to frame one were dropped. Indeed we might dispose of this entire subtopic by reference to the opinion in *Robertson* v. *Baldwin*, 165 U. S., already referred to, according to what appears therein at page 281 as follows:

"The law is perfectly well settled that the first ten Amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case."

So far, therefore, from this proposition on the part of the United States impressing us, it indicates why it is that the constitution of a jury in criminal cases as to numbers as known to the common law is a matter of governmental regulation, while several things which are secured by the Amendments, and which may be waived by an accused person, are of a different character. It also assists in explaining the fact that, in accordance with the rules of the common law, some things may be waived, as, for example, the qualification of a particular juror or the right to a speedy trial, while it does not follow that, by analogy, a waiver may extend to any part of the provisions of Article III. of the original Constitution applicable hereto.

The purpose and principal effect of the first clause of the Amendment is evidently to add to the requirement of a jury trial in Article III a guaranty for the benefit of the accused that the trial shall be speedy and public, the jury impartial, and drawn from the state and district in which the crime is

claimed to have been committed. This is pointed out in

Callan v. *Wilson*, 127 U. S. 540, at p. 549,

and the Amendment is so treated by Mr. Justice Miller, in the lectures above referred to.

Miller on the Constitution, p. 507.

Indeed, *Callan* v. *Wilson*, supra, contains an authoritative determination that the Sixth Amendment was not intended to supplant that part of the Third Article which relates to trial by jury, and there seems to be no authority whatever for the contrary view.

In cases within the terms of Article III, therefore, it is that Article which requires that the trial shall be by jury, and the Amendment merely assures the accused the right to enjoy certain incidents of jury trial, most of which at least, under that provision as at common law, are unquestionably in the nature of privileges which the accused may waive.

Article III, however, provides for the trial of "all crimes," while the language of the Amendment is "all criminal prosecutions." It would seem from the case of

Schick v. *United States*, 195 U. S. 65 (above cited),

that, as a result of this difference in phraseology, the Sixth Amendment has also an independent operation in that class of petty offences to which it is held that Article III does not apply, but the prosecution of which is regarded as a "criminal prosecution" within the language of the Sixth Amendment;

and that in that class of offences the Amendment furnishes to the accused a guaranty of the *right* of jury trial, if he chooses to insist upon it. The distinction in the character of the two provisions is plainly recognized in that case. The defendant had been tried by a District Court without jury by agreement between himself and the prosecuting officer. In determining whether his conviction under these circumstances was valid, the Supreme Court first considered whether the offence of which he was charged came within the scope of Article III, and having reached the conclusion that it did not and the further conclusion that there was no act of Congress and no public policy forbidding the waiver of a jury in the trial of petty offences not covered by Article III, the Court then referred to the Sixth Amendment as giving the accused *a right* to a jury trial, but held that that right may be waived. This conclusion was rested on the ground that,—

> When there is no constitutional or statutory mandate and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy (p. 72).

Article III is thus referred to as a constitutional mandate, while the Sixth Amendment is regarded as dealing with privileges which the accused is given the right to enjoy.

2. The Constitutional Jury a Jury of Twelve.

In accordance with the general rule, by which common law terms used in the Constitution are to be construed in their common law sense and with the incidents and attributes thereto historically

attaching, it has always been understood that the trial by jury referred to in the Constitution means such a jury trial as was known to the common law. This principle receives striking illustration, in respect to matters other than the number of jurors, from the case of

Capital Traction Co. v. *Hof*, 174 U. S. 1.

That a common law jury, and therefore a constitutional jury, is a jury of twelve and no less, was decided in

Thompson v. *Utah*, 170 U. S. 343 (above cited).

On page 349 the Court said:—

> Assuming, then, that the provisions of the Constitution relating to trials for crime and to criminal prosecutions apply to the Territories of the United States, the next inquiry is whether the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. This question must be answered in the affirmative.

After citing English authorities, the opinion proceeds, on page 350:—

> It must consequently be taken that the word "jury" and the words "trial by jury" were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offence of grand larceny in the Territory of Utah,—which was under the complete jurisdiction of the United States for all purposes of government and legislation,—the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons.

To the same effect is

Rassmussen v. *United States*, 197 U. S. 516.

The same principle, as applied to the situation presented when a juror is excused during the trial, received significant though incidental recognition in the passage from

Queenan v. *Oklahoma*, 190 U. S. 488, 551,

quoted above on page 62. The decision in that case that the disqualification of jurors is not a matter going to the jurisdiction of the Court, but a matter of personal right which the accused may waive, rests upon the established practice of the common law, and there is no mandate or provision of the Constitution which it could possibly be held to violate. The distinction between that question and the question of the number of jurors is plain, and is clearly recognized by the Court in the opinion.

In

Maxwell v. *Dow*, 176 U. S. 581,

the question was whether the Fourteenth Amendment had the effect of making the provisions contained in the first ten amendments operative in the State courts, including the provisions as to indictment for infamous crimes and trial by jury in civil and criminal cases. The Court held that those provisions were not thus made binding on the States, and that a provision in the Constitution of the State of Utah for trial by eight jurors did not violate the United States Constitution. Before reaching this conclusion, however, and in the course

of defining the question presented, the Court said on page 586:—

> That a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution, there can be no doubt. *Thompson* v. *Utah*, 170 U. S. 343, 349, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620. And as the right of trial by jury in certain suits at common law is preserved by the Seventh Amendment, such a trial implies that there shall be an unanimous verdict of twelve jurors in all Federal courts where a jury trial is held. *American Pub. Co.* v. *Fisher*, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; *Springville* v. *Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 816.

The decisions of State courts, some of which will be collected below, and the language of jurists and text-writers, both English and American, and indeed the entire body of authority on the subject, are to the same effect.

3. The Offences Included within the Scope of Article III.

The language of Article III, to the effect that the trial of "all crimes" shall be by jury, might conceivably have been construed as applying to every offence criminally prosecuted under the authority of the United States. The words would have borne that construction, and the result would have involved no departure from the strict rule of the common law. Excluding of course from the present discussion such ancient and obsolete institutions as that of the ordeal, the common law in the strict sense knew no mode of trial except by jury. Trial by magistrate without jury existed only by force of acts of parliament directing that mode of trial for

particular offences. Such statutes, like all acts of parliament, were, of course, of paramount authority in the English constitution. But, where the statutes creating offences did not prescribe the mode of enforcement, the necessary result was, as stated by Blackstone, that "they fall of course under the general rule and can only be convicted by indictment or information at the common law."

IV Bl. Com. 283.
Queen v. *Sturney*, 7 Mod. 99.

It is generally understood, however, that in construing the Constitution, we are to look not merely to the common law in the strict sense, but to the law of England as it existed when the Constitution was adopted, including those modifications of the original common law by act of parliament which had become firmly implanted in the traditional jurisprudence of the country. For centuries before the adoption of our Constitution it had been customary in England, by authority of the acts of parliament referred to, to try a large class of minor offences before the justices of the peace without jury. The offences thus tried were offences created and defined by parliament, and were in general in the nature of police regulations. This Court, therefore, construed the phrase "all crimes" in Article III of the Constitution, not as intended to include all offences prosecuted in the criminal courts, but as excluding a certain class of minor or petty offences.

Callan v. *Wilson*, 127 U. S. 540.
Schick v. *United States*, 195 U. S. 65 (both cited above).

It is not easy to draw the line with absolute accuracy. By the statute of 11 Henry VII, ch. 3, very broad jurisdiction was given to the justices of the peace, but the powers thus given were so abused, and the results so injurious to the liberty of the citizen, that the act was repealed in the first year of Henry VIII. Thereafter the English statutes giving jurisdiction to justices of the peace to try offences without jury were not general enactments relating to defined classes of offences, but specific acts, dealing with specific offences. The first statute under which a recorded case of summary conviction has been found is that of 33 Henry VIII, ch. 6, against the practice of carrying "daggs," or short guns. The jurisdiction gradually grew to considerable proportions by the addition of specific offences by acts of parliament, but it was not until the Summary Jurisdiction Act of 1879 that jurisdiction was made to depend upon a classification of offences by generic statutory definition.

The foregoing statement of the growth of summary jurisdiction in England is based on the very clear outline found in the Introduction of Paley's Summary Conviction.

To attempt to define the word "crimes," as used in Article III, by reference to the precise offences triable in England at the time of the adoption of the Constitution before justices of the peace without jury, would be logically impossible. Whether a modern police regulation describes a "crime" in the constitutional sense can hardly depend on whether in 1789 a similar offence was defined by statute in England and assigned to

the summary jurisdiction of justices of the peace. But if from the operation of the many special statutes dealing with particular statutory offences it resulted that offences of a certain class were pretty generally triable without jury, and if these offences were of such a kind that a definition of the word "crime" which excluded them would be logically defensible, those circumstances would have a legitimate bearing on the construction of the constitutional provision.

It appears from Blackstone's discussion of the subject that the offences tried by summary proceedings fell in a general way into two classes.

IV Bl. Com., p. 280 *et seq.*

The first includes offences and frauds against the excise and the revenue. These in their moral aspects were regarded in the popular estimation in a very different light from violations of the general criminal law, and the prompt and summary enforcement of statutory penalties was considered absolutely necessary for the due collection of the public moneys. The second class included the infliction of

> divers petty pecuniary mulcts and corporal penalties denounced by act of parliament for many disorderly offences, such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others.

It is impossible to draw the line of traditional English practice by any more precise definition. It was certainly not the line between felony and misdemeanor in the technical common law sense,

the great bulk of common law misdemeanors being indictable offences which must be tried by jury. While parliament had power to extend the summary jurisdiction of magistrates over any and all classes of offences, and while there was some irregularity in the exercise of this power, it is evident that the growth of the summary jurisdiction had, after all, an underlying principle. In matters of minor police regulation the procedure by indictment and trial by jury was needlessly slow, inconvenient, and cumbrous. To have required every petty offender to await a session of court and be tried with all the formality of common law jury trial would have overburdened the judicial machinery, while being oppressive rather than merciful to the offender. It was undoubtedly such considerations which led to the enactment of statutes for the summary trial of such offences. On the other hand, there is no reason to doubt that in regard to more serious offences involving heavier penalties, trial by jury continued to hold its traditional place in the mind of the nation as the chief bulwark of personal liberty; and the acts of parliament did not in general encroach upon this principle. In construing the word "crimes" in Article III, so far as its construction depended upon the history of summary conviction in England, this Court could do no more than adopt the principle which thus underlay the legislation of parliament, and frame the nearest possible approach to a general definition of the kind of offences customarily assigned to the summary jurisdiction. This

is understood to be what was meant by the following language in *Callan* v. *Wilson*, supra (p. 549):—

> The third article of the Constitution provides for a jury in the trial of "all crimes, except in cases of impeachment." The word "crime," in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offences of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offences punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a "crime" within the meaning of the third article, or a "criminal prosecution" within the meaning of the Sixth Amendment.

It was accordingly held that

> Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority, of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged (p. 557).

In

Natal v. *Louisiana*, 139 U. S. 621,

the plaintiffs in error had been convicted in a recorder's court of the city of New Orleans for keeping a private market within six squares of a public market, in violation of a city ordinance passed

by authority of a State statute. The maximum penalty was a $25 fine, and in default of payment thirty days in jail. The plaintiffs in error contended that in being tried without jury they had been deprived of the rights guaranteed them by the Fourteenth Amendment of the Constitution.

The case might have been disposed of on the principle afterwards decided in *Maxwell* v. *Dow*, supra, that the Fourteenth Amendment did not extend the provisions of the United States Constitution as to trial by jury to the courts of the States. The Court chose to decide it, however, on the ground that the regulation and control of markets for the sale of provisions are matter of municipal police which the legislature may intrust to a city council; that the ordinance in question was valid, and that "a breach of such an ordinance is one of those petty offences against municipal regulations of police which in Louisiana, as elsewhere, may be punished by summary proceedings by a magistrate, without trial by jury," citing the Louisiana Constitution, Louisiana cases, and *Callan* v. *Wilson*.

In

Schick v. *United States*, 195 U.S. 65 (above cited),

the same decision was reached as to trial without jury in the District Court of persons accused of violating section 11 of the act of August 2, 1886, known as the Oleomargarine Act (24 Stat. 209; U.S. Comp. Stat. 1901, p. 2228). That section imposed a penalty of $50 for the knowing purchase

or receipt for sale of oleomargarine not branded or stamped according to law. The opinion says (on pp. 67, 68), after referring to the $50 penalty:—

> So small a penalty for violating a revenue statute indicates only a petty offence. It is not one necessarily involving any moral delinquency. The violation may have been the result of ignorance or thoughtlessness, and must be classed with such illegal acts as acting as an auctioneer or peddler without a license, or making a deed without affixing the proper stamp. . . . In such a case there is no constitutional requirement of a jury.

After discussing in support of this last proposition the meaning of the word "crimes" as used in Article III of the Constitution, the Court concludes that portion of the opinion relating to this point as follows (p. 70):—

> But we need not go beyond the express rulings of this court. In *Callan* v. *Wilson*, 127 U. S. 540, reference was made to many decisions of State courts, holding that the trial of petty offences was not within any constitutional provision requiring a jury in the trial of crimes; and on p. 557 it was said:—
>
> "Except in that class or grade of offences called petty offences, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority, of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offence charged."

Reference may be made in passing to an unusual use of the word "misdemeanor" in the *Schick* case. On page 68 the Court says:—

> The truth is, the nature of the offence and the amount of

punishment prescribed rather than its place in the statutes, determine whether it is to be classed among serious or petty offences, whether among crimes or misdemeanors. Clearly both indicate that this particular violation of the statute is only a petty offence.

In thus opposing "misdemeanor" to "crime" instead of to "felony," as is the more regular use, the Court was evidently following the language quoted from Blackstone, on page 69 of the opinion, to the effect that properly speaking "crime" and "misdemeanor" are mere synonymous terms but that

in common usage the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of "misdemeanors" only.

It is evident from the entire opinion that the word "misdemeanors" is used as synonymous with "petty offences," the latter words being used in the same sense as in *Callan* v. *Wilson*.

While the line thus drawn between crimes and petty offences can hardly be defined with mathematical precision, the foregoing decisions indicate plainly the general principles governing the classification, and have carried the definition far enough to answer authoritatively any question that can be raised on that point in the case at bar.

B. APPLICATION TO THE PRESENT CASE.

1. Question of Waiver Immaterial.

Assuming as the basis of the discussion the propositions which thus appear to be established, it remains to consider their effect upon the issue of the present case.

In the first place, it follows necessarily from the character of the provision in Article III, as a peremptory direction of the only lawful mode of trial, that, if the constitutional requirement is not complied with, no waiver or agreement by the accused can give any validity to the proceedings. This point will be more fully elaborated than would otherwise be thought necessary, because both the argument of the Government, as set forth in its petition for *certiorari* and brief in support thereof, and the dissenting opinion of Judge Aldrich in the Circuit Court of Appeals, suggest a failure to appreciate the nature and effect of such a requirement.

Page 1 of the petition for *certiorari* states the question at issue to be whether the respondent, under substantially the circumstances of the present case,

> can have judgment against him arrested on the ground that he has been deprived of a constitutional right which he could not waive.

The same language, though coupled with an alternative form of statement, is used on p. 4 of the brief filed by the Government for this argument. Such a statement approaches the question from the wrong point of view, and seems to assume that the

Constitution can be or contain nothing except a bill of rights. The case depends upon something more fundamental than any mere right of the accused. The language quoted ignores the vital distinction between a provision of the frame of Government defining the only method by which the courts of the United States have any jurisdiction to try crimes against its authority, and a provision merely guaranteeing a personal right to the individual. To adopt the language above quoted from

Bank of Columbia v. *Okely*, 4 Wheat. 235, 244,

a provision of the latter class is placed on the footing of a *lex pro se introducta*, and the benefit of it may therefore be relinquished. But, when the provision in question is a peremptory limitation of the power and jurisdiction of the Court, the language of waiver has no application whatever, the defendant and the district attorney having no more power than any other individuals to give legal effect to a form of procedure which they undertake to substitute for that exclusively authorized by the Constitution.

This is very forcibly expressed by Judge Putnam in the opinion of the Circuit Court of Appeals (Record, p. 170).

> On the other hand, the provisions of section two of Article III. are peremptory in form, and point out absolutely the tribunal which must dispose of the crimes to which they refer. They cover nothing except what concerns the public interests, as well as personal liberty. The Article in unqualified terms establishes the tribunal. Inasmuch as the public, as well as the persons charged, have always an interest in what tribunal shall dispose of prosecutions for high crimes, it would appear

prima facie that no prosecuting officer nor any person accused, whether acting separately or by agreement, can substitute another locality or another tribunal for that which the letter of the Constitution designates.

The tribunal pointed out by Article III. consists of a jury, and, by necessary implication, of a court established under the Constitution and the laws, with a judge or judges appointed also according to the Constitution and the laws to preside therein. We have said that there is no authoritative determination with reference to the topic before us; but the jury to be empanelled for a criminal cause within the meaning of the Constitution has been directly and authoritatively determined in *Thompson* v. *Utah*, 170 U. S. 343, to consist of twelve. With the aid of this determination, the third Article points out perfectly the elements of the tribunal authorized to proceed against persons accused of crimes like that before us, including equally the court, the judge and the jury, and the number composing the jury. Has any one other than the makers of the Constitution, or those authorized to amend it, the power to substitute for what is thus declared? No one has ever conceived an affirmative answer as to the court or judge; and the apparent answer as to the jury would also be in the negative.

The requirement of jury trial in Article III, like any other equally mandatory provision, is not fundamentally the grant of a right at all. The defendant not only *may* be tried by jury, but, if he is tried at all, he *must* be so tried. He has no choice in the matter. In the language above quoted from Judge Story, "the Constitution decides how he shall be tried independently of any election on his part."

United States v. *Gibert*, 2 Sumner, 19, 72.

No doubt the framers of the Constitution believed that such a requirement would tend to the protec-

tion of persons accused of crime, and no doubt it may be said that the accused has a "right" to that mode of procedure, but it is a right arising merely from the fact that that mode of procedure is exclusively prescribed. The failure to assert such a right does not relieve the courts of their obligation to follow the only constitutional mode of procedure. To say, therefore, that the question is whether the accused has been deprived of a right which he could not waive is a loose and inaccurate statement, which tends to confuse the real issue. Admitting that whatever element of personal right was involved has been waived by the defendant, the question remains whether the mode of trial which the defendant and the prosecuting officer undertook to adopt is one to which any effect can be given under the Constitution.

The objection is expressed by Judge Cooley, in his Constitutional Limitations, as follows:—

> The infirmity in case of trial by jury of less than twelve by consent would be that the tribunal would be one unknown to the law, created by mere voluntary act of the parties; and it would in effect be requiring to submit to a species of arbitration the question whether the accused has been guilty of an offence against the State.
>
> Cooley, Const. Lim. (7th ed.), 458–459.

In a civil case there is nothing inconsistent with any legal principle in allowing the parties to submit their differences to practically any form of tribunal they may choose to select. The obligation to pay a civil judgment needs no better foundation than a contract between the parties. The enforcement of

the criminal law depends upon very different principles, and penalties for crime can be exacted only by the authority of the Constitution and the criminal laws. In the language of the Court in

Hill v. *The People*, 16 Mich. 351, 357,

(a decision in which Chief Justice Cooley concurred):—

> It would be adding materially to the generally recognized force of the obligation of contracts to hold that a defendant charged with a crime might, without a trial, enter into a binding contract with the prosecuting attorney to go to the penitentiary for a certain number of years in satisfaction for the offence. And yet it would approximate such a position, to hold that he might be bound by a contract providing for a trial before a court or jury unknown to the constitution or the laws, the result of which trial might be to place him in the same penitentiary.

In his dissenting opinion in the case at bar Judge Aldrich sought to avoid the force of this reasoning as follows (Record, p. 176):—

> The doctrine of waiver, as applied to a trial which would be otherwise irregular, is of course not to be narrowly accepted as making an unconstitutional trial valid by contract, but is grounded more upon the idea that the agreement, consent, and conduct of the accused, with respect to a question not affecting the jurisdiction of the court, whereby he induces the court to go forward, and whereby he secures the chance of getting an acquittal, operate as a waiver of the right to raise the objection, in the event of an unfavorable result, that the course adopted was irregular.

This statement of the matter is inapplicable to the present case, because it assumes that the irregu-

larity is "with respect to a question not affecting the jurisdiction of the court." Failure to comply with a peremptory requirement of the Constitution defining the only lawful mode of trial could hardly be called an irregularity not affecting the jurisdiction of the court; and to assume that the requirement of Article III is not of that peremptory character is to assume the very point at issue. Judge Aldrich's proposition being based in effect on that assumption, there is no need to consider it further.

It is evident that the same proposition could hardly be maintained as to defects jurisdictional in character. In the present case, for example, to hold the defendant bound by agreement not to raise the objection would not settle the matter, unless it were further held that the objection could not be considered unless the defendant raised it, which would amount in effect to "making an unconstitutional trial valid by contract." In fact, however, when the objection, as in the present case, goes to the jurisdiction of the court, and the record shows on its face that the proceedings were without validity, the appellate court is in duty bound to recognize the defect of its own motion, and dispose of the case accordingly. This principle was illustrated by the *Schick* case, in which the objection to trial without jury was not raised by either party, but was suggested by the Court, counsel on both sides being requested to file briefs for the assistance of the Court in determining it.

Without trespassing on the patience of the Court by a detailed argument of a point believed to be long since settled by authority, it should be observed

that the decisions construing Article III as making a trial by a constitutional jury indispensable to the validity of the proceedings are supported by logical and historical considerations which not only strongly enforce such a construction, but render any other well-nigh impossible.

In the first place, the body of the Constitution, as pointed out in the passage above quoted from the opinion of the Circuit Court of Appeals, is a frame of government and not a bill of rights. Its purpose was to define the powers of the general government as distinguished from the States, to establish the offices and agencies through which those powers were to be exercised, and, so far as thought necessary, to prescribe the manner of their exercise. It established a judiciary department, just as it established a legislative and an executive department, and it made certain provisions as to the manner in which each department should perform the functions assigned to it. The provision that the trial of all crimes shall be by jury is of this character. Considering the nature of the instrument, creating as it did a new government, and constituting the only ultimate source of authority for any officer or agency under that government, it is difficult to see whence any tribunal could derive authority to try an indictment for crime against the United States in any manner except that expressly prescribed in unqualified and unambiguous language by the Constitution.

In the second place, the conception of the ancient rules of criminal procedure as absolute in their requirements, so that their strict observance was

indispensable to the validity of the proceedings, was deeply rooted in the common law, and extended to formalities which appear to us now of small importance. Nothing was more natural than that men brought up in the atmosphere of the common law should regard the constitution of the tribunal by which crimes should be tried, as a matter for precise and absolute regulation by the law of the land. To have made such a matter dependent on the agreement of the parties would have involved a notable departure from the point of view of the common law toward all criminal prosecutions.

Underlying this traditional point of view was the feudal conception that all free citizens were the king's men, and that their lives and liberty were not their own to dispose of,—a conception that still survives in a modified form. The principle in its modern expression is that the State as the representative of the people as a whole has an interest in the life of its citizens, and in their freedom from such unmerited punishment as would deprive the community of their contribution toward the performance of its labors and the promotion of its well-being.

Finally, the absolute character of the requirement under discussion finds ample justification, if considered merely from the standpoint of protection to the accused. An assertion that a man accused of crime is necessarily competent to judge for himself what form of trial is best adapted to protect him from injustice would be obviously untrue. The community may very properly decide that question by its collective wisdom, and enact that

no man shall be punished in the name of the State who has not had such a trial as the highest wisdom of the community deems best adapted to the ends of justice. This conclusion is still further enforced by the consideration, more than once referred to by this Court, that one on trial under a criminal charge, whether innocent or guilty, is necessarily under a sort of duress, which affects his will and judgment in connection with the proceedings of his trial. To hold him bound by every consent he might give under such conditions and in reference to such a matter might easily result in something very far from justice.

The attitude of the common law is well summed up in the following language of Sir John T. Coleridge in

Regina v. *Bertrand*, L. R., 1 P. C. 520, 534,

> It is a mistake, moreover, to consider the question only with reference to the Prisoner. The object of a trial is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be—not the interests of either party. This remark very much lessens the importance of a Prisoner's consent, even when he is advised by Counsel. and substantially, not, of course, literally, affirms the wisdom of the common understanding in the profession, that a Prisoner can consent to nothing.

2. The Present Case within the Scope of the Constitutional Requirement.

The offence defined by section 5209 of the Revised Statutes, under which this prosecution was brought, is termed by the statute a misdemeanor. The use of that term is immaterial, however, as

this Court has expressly decided that Article III applies to misdemeanors as well as to felonies.

Callan v. *Wilson*, supra.

It would be equally immaterial if Congress had characterized the offence denounced in the statute as a petty offence, or the statute itself as a police regulation, or had undertaken to provide in so many words that it should not be construed as within Article III of the Constitution. The application of the constitutional provision is for this Court and not for Congress to determine, and, as stated in the *Schick* case, above cited, depends upon "the nature of the offence and the amount of punishment prescribed." The present statute includes offences in the nature of embezzlement and larceny, its violation involves serious moral turpitude, and is punishable (without any alternative of a fine) by from five to ten years' imprisonment, which under section 5541 of the Revised Statutes may be in the penitentiary.

It could hardly be held that an offence which must be prosecuted by indictment under the Fifth Amendment is nevertheless outside the scope of Article III, and this for two reasons. In the first place, any argument based on the common law practice of summary proceedings would necessarily have the same effect on the question of indictment as on the question of jury trial, since the two were equally incidents of the common law method of trial (the only difference being that, while there was a substitute for the indictment, there was

none for the trial by jury), and both were equally dispensed with in the summary proceedings under parliamentary authority. In the second place, it could hardly be held that the words "all crimes" in Article III are not at least as broad in their application as the words "any infamous crime" in the Fifth Amendment. The offence here charged is an infamous crime, which must be prosecuted by indictment.

Ex parte Wilson, 114 U. S. 417.

There is neither logic nor authority for holding that such an offence is not within the requirement of jury trial.

Finally, the present offence is in every respect more serious than the misdemeanor involved in *Callan* v. *Wilson*, to which it was expressly held that the language of Article III applied.

The proposition that this offence is within the terms of Article III was not questioned by the Government in its petition for writ of *certiorari* and brief in support thereof, and it does not seem to be seriously questioned in the Government's brief for this hearing. On page ~~20~~ of that brief it is conceded that the language of Article III included, when the Constitution was adopted, both felonies and misdemeanors as then defined by the law. The only reason suggested for construing it as not including the offence here in question is that Congress has chosen to call the offence a misdemeanor. Even if the mere name given by Congress to an offence could be allowed to determine the operation of the constitutional provision, it is not

clear why calling an offence a misdemeanor should take it outside a provision which from the beginning admittedly applied to misdemeanors.

3. The Constitutional Requirement not Complied With.

The following statement of the Government's position appears on page 9 of the petition for *certiorari*:—

> The Government did not contend that a defendant could, before his trial, agree that the tribunal before which he was to be put upon trial should be made up of a judge and less than twelve jurors, because the defendant would then be consenting to the creation of something which was not a court. What the Government contended was, that if, on the other hand, jurisdiction over the trial is obtained by the organization of a constitutional court, and the court so constituted is subsequently diminished, with the defendant's consent, by one or two jurors, the trial may proceed and a lawful verdict be taken from the jury which has in this way suffered a "fractional loss."
>
> With all deference to the conclusions of the majority of the learned judges of the Circuit Court of Appeals, it is submitted that the error of their opinion lies in the fact that it makes no distinction between an agreement on the part of the defendant to be tried by an illegally constituted tribunal—that is to say, one originally made up in a manner contrary to the requirements of law—and an agreement, after the tribunal has been in all respects legally constituted, to assent to that which, in the apt language of Mr. Justice Holmes in *Interstate Consolidated Street Railway Company* v. *Massachusetts* (207 U. S. 79), may be termed a "fractional loss."

See also pages 25 and ~~37~~ 40 of the Government's brief.

The Government thus concedes that a tribunal which originally included a jury of less than twelve would be "something which was not a court,"

created by the consent of the defendant, "an illegally constituted tribunal—that is to say, one originally made up in a manner contrary to the requirements of law."

It therefore remains to inquire whether the distinction relied on by the Government can be supported on any logical ground, and whether, to adopt a phrase from the petition, less is necessary to *constitute a court* when the verdict is rendered than when the district attorney rises to make his opening statement.

It is believed that, in attempting to draw the distinction above stated, counsel for the United States were under the influence of the same misconception of the question at issue which was pointed out on page 79 of this brief, and were misled by a resulting failure to distinguish between cases arising under the United States Constitution as construed by this court and such cases as

Commonwealth v. *Dailey*, 12 Cush., 80,

which is cited in their petition and brief. That case arose under a provision of the Massachusetts Constitution very differently worded from Article III of the Constitution of the United States, and proceeded distinctly on the ground that the Massachusetts provision is "*lex pro se introducta*," a guaranty of a personal privilege, like many of the amendments to the United States Constitution, including, as shown by the *Schick* case, the Sixth Amendment. It necessarily follows from this construction of the Massachusetts provision that there is no *constitutional prohibition* against a criminal trial in the courts

of that State with less than twelve jurors by consent of the defendant, and this is equally true whether the trial starts with less than that number or a jury originally composed of twelve is subsequently diminished.

Cf. *Jones* v. *Robbins*, 8 Gray, 329, 341.

The objection intimated by Chief Justice Shaw, on page 83 of the opinion in the *Dailey* case, to permitting a trial with less than twelve by consent "unless upon some unforeseen or urgent exigency," was evidently based on considerations of public policy and a natural desire to discourage too easy or frequent a departure from established and time-honored forms. He therefore suggested that the whole matter would be regulated by the discretion of the presiding judge,—a suggestion obviously incompatible with an imperative constitutional requirement. Under the construction thus applied by the Massachusetts court to the State constitution, a distinction such as the government seeks to draw in the present case might be logical, simply because the whole question is treated as one of discretion, and there would ordinarily be no occasion for the exercise of such discretion at the outset of the trial. In other words, under the Massachusetts doctrine, the constitutional objection to a reduction of the number of jurors by consent is *entirely eliminated* on the ground that the constitution merely secures a personal right which can be waived; and the distinction (if any is intended to be suggested) between such reduction in the number at the beginning and a similar reduction at a later stage must be under-

stood to rest on considerations altogether independent of any constitutional prohibition.

But the situation under Article III of the Federal Constitution is entirely different. That article being construed as an absolute constitutional mandate prescribing the only tribunal before which an indictment for crime can legally be tried, it cannot be eliminated from the case by any wish or consent of the defendant, and it goes almost without saying that the defendant and the district attorney cannot any more effectively amend the Constitution at one stage of the trial than at another.

The distinction which the government asserts must be supported, if at all, on a ground which satisfies, rather than dispenses with, the imperative requirement of trial by jury. There would be one possible ground on which, if there were any historical basis for it, such a result might be reached. If there had been under the common law of England, or perhaps that of Massachusetts before the adoption of the Federal Constitution, a practice by which the discharging of one or more jurors by consent in the course of the trial was one of the incidents of the common law trial by jury, it would be logical and in harmony with established principles of constitutional construction to hold that such a practice is a part of the definition of trial by jury as those words are used in the Constitution. A verdict rendered under such circumstances by less than twelve jurors would then be supported, not because the requirement of Article III had been waived by the defendant, but because the defendant

would have had a jury trial within the meaning of that article.

Nothing short of express authority, showing a practice at the common law well established as a customary incident of jury trial, to excuse a portion of a criminal jury during the trial and take a verdict from the remainder, would suffice to show either that the common law permitted a practice so little in harmony with its spirit and with the learning on the subject, or that the Constitution, while making a jury of twelve absolutely essential to a legally constituted tribunal at the beginning of the trial, is satisfied with eleven or ten or six, when the time comes for the jury to render its verdict. In any consideration of the matter the question inevitably suggests itself which Chief Justice Shaw propounded in the *Dailey* case and undertook to answer in the following manner:—

> But it is asked, if consent will authorize a trial before eleven jurors, why not before ten, or six, or one. It appears to us, that it is a good answer to say, that no departure from established forms of trial in criminal cases can take place without permission of the judge, and no discreet judge would permit any such extravagant or wide departure from these salutary forms as the question supposes, nor any departure, unless upon some unforeseen or urgent exigency.
>
> *Commonwealth* v. *Dailey*, 12 Cush. 80, 83.

In commenting on this passage, we cannot do better than to adopt the language of Judge Putnam, appearing on page 173 of the Record:—

> We have been unable to answer satisfactorily the question which he thus asked himself to determine, or to frame any satisfactory rule by which, if the waivers at bar can be sus-

tained, the jury may not be made to consist of one man instead of twelve. The legal mind involuntarily rejects a proposition that the jury might be so constituted constitutionally; and yet we are unable to determine at what point the weakening of the panel should stop unless it might by consent be reduced to a single individual. Chief Justice Shaw likewise finds no solution except the discretion of the judge; but, while necessarily the discretion of the judge is often interposed in administering the civil law, and, to a certain extent, the criminal law, it seems wholly inappropriate that it should be availed of in a matter of so grave a character as the construction and practical application of the Constitution of the United States. We are not able to accept a proposition of that kind.

This conclusion is in harmony with the reasoning of this Court in

Thompson v. *Utah*, 170 U. S. 343, 353.

If, in respect to felonies committed in Utah while it was a Territory, it was competent for the state to prescribe a jury of eight persons, it could just as well have prescribed a jury of four or two, and, perhaps, have dispensed altogether with a jury, and provided for a trial before a single judge.

Such being the logical difficulties which the Government's position involves, it remains to inquire whether there is any evidence to support that position in the only way it could be supported, that is, by showing an established practice to take verdicts from less than twelve jurors as an incident of common law jury trial in criminal cases.

Counsel for the Government have not produced any authority whatever for the existence of such a practice at the common law. In the present case the search of the English authorities has been

prosecuted both by counsel and by the judges of the Circuit Court of Appeals with great industry and thoroughness, and with the same negative result. Not only is this true, but the question has been examined by eminent text-writers and by the courts of nearly every State in the Union, and neither text-book nor decision has been found which suggests that any such practice prevailed at the common law. In the opinion of the Circuit Court of Appeals, Judge Putnam says with entire accuracy of the case of

Commonwealth v. *Dailey*, 12 Cush. 80 (above cited):—

> The opinion of Chief Justice Shaw was based entirely on propositions initiated by himself, or by the court he represented. All the cases cited by him have been carefully examined, and they in no way meet the difficulty here; and he made no claim that they did. The conclusion he reached stood entirely on the force of his own reasoning (Record, p. 172).

Again, in reference to the possible effect of such a practice existing in Massachusetts when the Constitution was adopted, Judge Putnam says (Record, p. 173):—

> For the traditional law of New England we look to Dane's Abridgement, where we are unable to find any trace of a practice supporting the proceedings now in review before us; and Chief Justice Shaw, who certainly would have known of such a practice if there had been any, in no degree rested *Commonwealth* v. *Dailey* on any assumption of that nature.

On the other hand, we have the authority of Chief Justice Cooley, who declares in his Constitutional Limitations that, in case of trial by jury

of less than twelve, "the tribunal would be one unknown to the law," and it appears by the cases cited that in making that statement he had in mind the situation presented when a juror is excused in the course of the trial.

Cooley, Const. Lim., (7th ed.), pp. 458–459.

That situation has arisen in a number of the States and been passed upon in many of their decisions. Some of these follow *Commonwealth* v. *Dailey*, supra, and adopt the view that the provision for jury trial in the particular State Constitution is in the nature of "*lex pro se introducta*" and can be waived. In others the constitutional provision is construed like that of the Federal Constitution as a peremptory direction of the only lawful mode of trial. But in none of the cases is there any suggestion of a common law practice permitting a reduction of the panel, and, wherever the constitutional provision is held to be mandatory, it is treated as beyond question that the provision is violated unless the full jury of twelve concur in the verdict. These cases are collected on page 106 below.

This Court has more than once declared the necessity of twelve jurors concurring in the verdict. See quotations from

Thompson v. *Utah*, 170 U. S. 343,
Queenan v. *Oklahoma*, 190 U. S. 488, 551,
Maxwell v. *Dow*, 176 U. S. 581, 586,

on pages 60, 62, and 70 of this brief, and compare

Hawaii v. *Mankichi*, 190 U. S. 197, 216.

The statements in the English authorities as to the number of jurors either expressly refer to a *verdict* of twelve or contain no suggestion that the number can be reduced at any stage of the trial. See

2 Hale, P. C., 161.
Finch's Law, 400.
Bac. Abr., Tit. Juries, A.
Trials Per Pais, 92 *et seq.*

The note in Forsyth's History of Trial by Jury, page 241, to which Judge Aldrich calls attention in his dissenting opinion (Record, p. 179), clearly refers to civil cases.

Though no explicit authority has been found in the English books, dealing in terms with a waiver of the full number of jurors, there are several cases which discuss the proper course to adopt on the death or serious illness of a juror during the course of the trial, and none of these cases suggests the possibility that the trial might by consent or under any circumstances be continued with eleven jurors, and a lawful verdict rendered.

Rex v. *Scalbert,* 2 Leach, 620.
Rex v. *Edwards,* R. & R. 24.
Regina v. *Beere,* 2 M. & R. 472.
Regina v. *Ashe,* 1 Cox, 150.

Finally, as expressing the attitude of the English law on waiver in criminal trials generally, reference may be made again to the passage quoted on page 87 above, from

Regina v. *Bertrand,* L. R., 1 P. C. 520, 534.

The unyielding strictness with which the common law insisted upon the literal observance of all technical requirements, particularly in the administration of the criminal law, is familiar to any student of the subject. Details of procedure utterly trifling in comparison with the number of jurors, were considered essential to the validity of the proceedings. There are several expressions in the earlier authorities insisting upon the concurrence of twelve jurors in the verdict, some of which have been cited. In the light of these expressions any such practice as we are now considering would have been a surprising departure from the usual rigidity of common law criminal procedure. It is impossible to believe that such a practice could have existed without being mentioned by any of the writers on the subject, ancient or modern, or that in a day when the ingenuity of counsel in raising objections to form and procedure at every stage of the case was certainly not inferior to that of the present day, no counsel for a defendant convicted after such a proceeding would ever have raised the point. It is much easier to believe that the rule stated by the authorities above quoted, that the verdict must be the unanimous verdict of twelve jurors, was understood and accepted by the entire legal community without qualification, and that in a day when the strict observance of forms was so much a matter of course, no departure from that rule was ever attempted.

C. COLLECTION OF STATE COURT DECISIONS.

For various reasons, some of which are suggested below, it was not believed that an elaborate citation of State court decisions on constitutional requirements of jury trial was necessary or would be materially helpful in the argument of the present case. A collection of State cases is here subjoined, however, for the convenience of any of the judges who may care to refer to them.

1. Cases on the Nature of the Requirement of Jury Trial in Criminal Cases.

It must of course be borne in mind that decisions of State courts on this question are based upon the language of their own constitutions, and this language may bear or may require a different construction from that applicable to Article III of the United States Constitution. There are several States in which it is held that the benefit of the constitutional provision may be waived by the accused, the provision being thus treated as "*lex pro se introducta.*" Decisions to this effect are

Commonwealth v. *Dailey*, 12 Cush. 80 (above cited).
Lavery v. *Commonwealth*, 101 Pa. St. 560.
State v. *Worden*, 46 Conn. 349.
Craig v. *State*, 49 Ohio St. 419.
State v. *Almy*, 67 N. H. 274.
League v. *State*, 36 Md. 257.
State v. *Sackett*, 39 Minn. 69.

State v. *Woodling*, 53 Minn. 142.
State v. *Kaufman*, 51 Ia. 578.
Lovilia v. *Cobb*, 126 Ia. 557.
Murphy v. *State*, 97 Ind. 579.
Edwards v. *State*, 45 N. J. Law, 419.
Langbein v. *State*, 37 Tex. 162.
State v. *Ellis*, 22 Wash. 129.

In all these cases, however, the provision of the State constitution was less imperative in form than that of the Third Article of the United States Constitution, and in nearly all the guaranty was expressed in some such language as "the accused shall have *the right*," or "*the right* . . . shall be preserved." Most of the State constitutions also are much more in the nature of a bill of rights than the body of the United States Constitution. Many of these cases follow the authority of the *Dailey* case above discussed, and few, if any, contain any full or satisfactory discussion of the question.

On the other hand, many States hold that the constitutional provision is imperative and cannot be waived, although in many of these cases the language of the constitution is that of the preservation of a right.

Cancemi v. *People*, 18 N. Y. 128, reaffirmed in
People v. *Guidici*, 100 N. Y. 503, 508.
Cf. *Maurer* v. *People*, 43 N. Y. 1.
Swart v. *Kimball*, 43 Mich. 443, 448.
Paulsen v. *People*, 195 Ill. 507.
State v. *Mansfield*, 41 Missouri, 470.

People v. *O'Neil*, 48 Cal. 257.
State v. *Simons*, 61 Kan. 752.
Cf. *Michaelson* v. *Beemer*, 72 Neb. 761.
Arnold v. *State*, 38 Neb. 752.
State v. *Scruggs*, 115 N. C. 805.

2. Cases on the Class of Offences Included within the Constitutional Provision.

It has generally been held, wherever the question has been raised, that the constitutional provision for jury trial, whether construed as a mandate or a guaranty, does not extend to a class of smaller offences. Cases defining the limits of this class are few. The tendency in the State courts, however, is illustrated by the following cases. In

State v. *Mansfield*, 41 Mo. 470,

the Court said that, *in cases of misdemeanor*, by authority of statute,

> the accused may waive a jury or agree on a certain number, but in those offences including capital crimes and felonies which under the Constitution can only be proceeded against by indictment of a grand jury and can only be tried by a petit jury, the jury must be composed of twelve persons.

In

Danner v. *State*, 89 Md. 220,

the Court said, speaking of trial by jury:—

> It is clear that it cannot be demanded in many minor offences. These could always be reached by summary proceedings. . . . It may, however, be stated as a general rule that for any criminal offence for which a person is liable to infamous punishment, a trial by jury cannot be denied him. It cannot be questioned that confinement in the pententiary is an infamous punishment.

In

Paulsen v. *People*, 195 Ill. 507,

the Court said that the test with reference to the requirement of trial by petit jury was whether the offence was necessarily prosecuted by indictment.

> At the common law, trial by jury was enjoyed only by those against whom the accusation was made by indictment. . . . It is this common law right of trial by jury to which our constitution refers, and in the class of cases in which that right existed at the common law, an essential part of the tribunal for the trial of such accusations is a jury.

As the constitution of Illinois expressly made an indictment necessary for offences punishable by imprisonment in the penitentiary, it was held that the provision as to trial by petit jury must be applied within the same limits.

The tests suggested in these three cases are in fact substantially identical, and are so understood by the courts. "Misdemeanor" is defined by statute in Missouri and in most of the States as including offences not punishable by death or imprisonment in the penitentiary. See collection of statutes in

Mackin v. *U. S.*, 117 U. S. 348.

And authorities are generally agreed that punishment in the penitentiary marks the line of infamous crimes and infamous punishments, in accordance with the decisions in

Ex parte Wilson, 114 U. S. 417.
Mackin v. *U. S.*, 117 U. S. 348.

An examination of the cases which, in considering

what the constitutional provision covers, draw the line at "misdemeanors," makes it sufficiently apparent that the word is used in its modern sense, as designating offences not liable to infamous punishment.

In States in which the constitutional provision is held to be a personal guaranty there is of course no distinction as to waiver between lesser and greater offences. Of the cases cited on pages 100 and 101 above, the *Dailey*, *Lavery*, *Sackett*, *Woodling*, *Lovilia*, and *Langbein* cases were misdemeanor cases; the others were cases of felony.

That the *Lovilia* case does not rest on any distinction between misdemeanor and felony sufficiently appears from the *Kaufman* case in the same jurisdiction.

In the *Sackett* case the Court expressly said that it was unnecessary to distinguish between felony and misdemeanor, as the opinion proceeded on the assumption that the Constitution guaranteed the accused a jury trial if he demanded it.

The case of

Commonwealth v. *Dailey* (supra)

is sometimes cited for the proposition that jury trial can be waived "in misdemeanors." In fact, it is perfectly clear from the language of the opinion that the doctrine of that case applies to all classes of offences; and this is brought out still more plainly by

Jones v. *Robbins*, 8 Gray, 329, 341.

The same is true of the Pennsylvania case of

Lavery v. *Commonwealth* (supra),

and the Texas case of

Langbein v. *State* (supra).

3. Cases on the Question of What Constitutes Trial by Jury.

Only one case has been found in which there is any suggestion that a jury of less than twelve can be a constitutional jury (except where, as in Utah, the constitution expressly provides for a smaller number).

In

State v. *Borowsky*, 11 Nev. 119,

the court took the unique position that, while it was "implied in the Constitution and expressly enacted in the law" that on the trial of an indictment a jury could not be waived, consent to trial by eleven jurors was not a waiver of a jury trial. The court said (on p. 127):—

> There is certainly much apparent and perhaps real force in the argument that trial by eleven jurors is no jury trial, but there is very strong authority for holding the defendant estopped . . . from saying that it is not and . . . it ought to be so held if there is any reasonable ground for such decision.

The Massachusetts case of *Commonwealth* v. *Dailey* is cited as authority for this decision; but the *Dailey* case stands for no such doctrine, and the notion of a jury trial by estoppel does not seem to have appealed to the courts of other States.

In none of the cases which involve the validity of a verdict rendered by less than twelve jurors is any distinction suggested, such as the Government now seeks to draw, between a trial begun

before eleven jurors and one in which the original number of twelve is later reduced. The decision turns in each case upon the character and purpose of the constitutional provision. In the following cases cited above on pages 101 and 102 a juror was excused by consent during the trial, and the verdict of eleven was held void.

Cancemi v. *People*, 18 N. Y. 128.
People v. *O'Neil*, 48 Cal., 257.
State v. *Mansfield*, 41 Mo. 470.
State v. *Simons*, 61 Kan. 752.
State v. *Scruggs*, 115 N. C. 805.

In the following cases, cited on pages 100 and 101, the verdict was sustained under the same circumstances, but on the ground that the constitutional provision in question was merely a guaranty of a personal right, which would be equally applicable to a trial begun with eleven.

Commonwealth v. *Dailey*, 12 Cush. 80.
State v. *Sackett*, 39 Minn. 69.
State v. *Kaufman*, 51 Iowa, 578.
Cf. *State* v. *Ellis*, 22 Wash. 129.

4. Cases Proceeding on Other than Constitutional Grounds.

In some cases the decision that a trial without jury or a verdict of less than twelve is invalid is rested on the ground that the legislature has not authorized such a mode of trial, the constitutional power of the legislature to do so not being decided.

See, for example,

Wartner v. *State*, 102 Ind. 51.

In a good many cases, in fact, it is not clear whether the decision holding the conviction invalid rests on constitutional grounds or on the want of statutory authority, and such cases have not been included in the foregoing collection.

Where statutes have been passed and upheld permitting trial by the court without jury, it has been held that these statutes do not legalize a trial by less than twelve jurors.

Wartner v. *State* (supra).
State v. *Ellis*, 22 Wash. 129.

Respectfully submitted,

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HENRY W. DUNN.

Supreme Court of the United States

UNITED STATES,
PETITIONER,

v.

JOHN W. DICKINSON,
RESPONDENT.

On Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

SUPPLEMENTAL BRIEF FOR THE RESPONDENT.

Certain changes made in the Government's brief after it was first completed ready for filing, and copies furnished to the defense, necessitate the citation of a few additional authorities in behalf of the respondent.

I.

ADDITIONAL AUTHORITIES ON THE QUESTION OF JURISDICTION.

A. CERTIORARI BEFORE THE ACT OF 1891.

The first important change in the Government's brief is the insertion on pages 13 to 15 of a discussion of *"Certiorari at common law and under acts of Congress prior to* 1891."

The Act of 1789, c. 20, sect. 14 (now Revised Statutes, sect. 716) gave to the Supreme Court and the circuit and district courts "power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." The Government cites

In re Chetwood, 165 U. S. 443,

in which a writ of *certiorari* was issued under R. S., Sec. 716, and from the statement in the opinion in that case (p. 462) that "whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice," draws the following conclusion:

> The writ of *certiorari,* therefore, under the Constitution and the statutes of the United States is strictly the common law writ of that name with all its functions and attributes, so far as applicable to our system of jurisprudence. (Government's Brief, p. 14.)

There is nothing in the *Chetwood* case to support this sweeping assumption, and it is sufficiently answered by the opinion of this court in

Ex parte Vallandigham, 1 Wall., 243, 249:

> Our first remark upon the motion for a *certiorari* is, that there is no analogy between the power given by the Constitution and law of the United States to the Supreme Court, and the other inferior courts of the United States, and to the judges of them, to issue such processes, and the prerogative power by which it is done in England. The purposes for which the writ is issued are alike, but there is no similitude in the origin of the power to do it. In England, the Court of King's Bench

has a superintendence over all courts of an inferior criminal jurisdiction, and may, by the plenitude of its power, award a *certiorari* to have any indictment removed and brought before it; and where such *certiorari* is allowable, it is awarded at the instance of the king, because every indictment is at the suit of the king, and he has a prerogative of suing in whatever court he pleases. The courts of the United States derive authority to issue such a writ from the Constitution and the legislation of Congress.

Compare the similar statement as to *habeas corpus* in

Ex parte Bollman, 4 Cranch, 75, 93:

As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States.

Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied. The reasoning from the bar, in relation to it, may be answered by the single observation, that for the meaning of the term *habeas corpus,* resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.

This opinion is not to be considered as abridging the power of courts over their own officers, or to protect

> themselves, and their members, from being disturbed in the exercise of their functions. It extends only to the power of taking cognizance of any question between individuals, or between the government and individuals.
>
> To enable the court to decide on such question, the power to determine it must be given by written law.

It may be added that the early English use of *certiorari* in criminal cases described in the authorities cited by the Government, was, as indicated in the above passage from the *Vallandigham* case for the purpose of *transferring the trial* of a criminal case into the King's Bench, not to review in an appellate proceeding for the correction of error a decision of an inferior court in favor of the accused.

Looking then only to the Constitution and the statutes, do we find, as the Government seems to argue, before the Act of 1891, a grant to this Court of appellate jurisdiction to review by *certiorari* for the mere correction of error any or all decisions of the lower Federal courts not otherwise reviewable?

Perhaps the leading case on the appellate jurisdiction of this Court in criminal cases is

United States v. *More*, 3 Cranch, 159,

where the Court said (pp. 172-173):

> In support of the jurisdiction of the court, the attorney-general has adverted to the words of the constitution, from which he seemed to argue, that as criminal jurisdiction was exercised by the courts of the United States, under the description of "all cases in law and equity arising under the laws of the United States," and as the appellate jurisdiction of this court was extended to all enumerated cases, other than those which might be brought on originally, "with such exceptions, and under such regulations, as the congress

shall make," that the supreme court possessed appellate jurisdiction in criminal, as well as civil cases, over the judgments of every court, whose decisions it would review, unless there should be some exception or regulation made by congress, which should circumscribe the jurisdiction conferred by the constitution.

This argument would be unanswerable, if the supreme court had been created by law, without describing its jurisdiction. The constitution would then have been the only standard by which its powers could be tested, since there would be clearly no congressional regulation or exception on the subject.

But as the jurisdiction of the court has been described, it has been regulated by congress, and an affirmative description of its powers must be understood as a regulation, under the constitution, prohibiting the exercise of other powers than those described.

This doctrine has been often reiterated. See

Ex parte Yarbrough, 110 U. S. 651, 653,

and the passage quoted from

Cross v. *United States*, 145 U. S. 571, 574,

on page 17 of the original brief for the respondent, and cases cited in those opinions.

Do these decisions mean merely that criminal cases cannot be reviewed *by writ of error or appeal* without express statutory authority, leaving it to be understood that all criminal cases can be reviewed here by *certiorari* under R. S., Sect. 716, for the correction of any error that may have been committed by the lower courts? The contrary was expressly decided in

Ex parte Gordon, 1 Black, 503.

See also

American Construction Co. v. *Jacksonville, etc., Ry. Co.*, 148 U. S. 372, 380,

and cases there cited, and compare

Ex parte Kearney, 7 Wheat., 38, 42-43.

Until the decision of the *Chetwood* case, in 1897, *certiorari* had been issued by this court only as an auxiliary process to supply imperfections in the record of a case already before it. The decision in the *Chetwood* case is explained as follows in

In re Tampa Suburban R. R. Co., 168 U. S. 583, 587:

> In the case of *In re Chetwood*, 165 U. S. 443, 461, we allowed the writ to bring up for review certain final orders of the Circuit Court, *which interfered with causes pending in this court;* and the question of the issue of the writ by this court in the exercise of its inherent general powers, under the Constitution did not arise.

The case of

Whitney v. *Dick*, 202 U. S. 132, 135,

seems to be the first instance of the issue of the writ by this Court as an independent proceeding in a case in which the jurisdiction of the Court had not been invoked by any other process.

What then is the distinction between *Whitney* v. *Dick*, in which the writ was issued to correct an excess of jurisdiction on the part of the Circuit Court of Appeals, and *Ex parte Gordon* in which it was denied for the correction

of error alleged to have been committed in a criminal case? The answer is suggested by this very statement of the effect of the two cases, and is confirmed by the case of

Harris v. *Barber,* 129 U. S. 366, 371-372,

where this Court quoted with approval the following language of the lower court, affirming the decision below on the ground therein stated:

> These averments constitute fully a statement of the relation of landlord and tenant between the parties. Now whether the proof came up to these averments or not cannot be inquired into upon a writ of *certiorari. Certiorari* goes only to the jurisdiction. It does not go to any errors of judgment that may have been committed by the justice in the progress of the exercise of that jurisdiction.

Note also the statement in the *Chetwood* case, above quoted, that the writ may be issued when the circumstances imperatively demand it, "*to correct excesses of jurisdiction,* and in furtherance of justice."

The distinction between preventing excesses of jurisdiction, and the mere correction of error, is an important and fundamental one, always observed in *habeas corpus* cases, and clearly expounded in

In re Bonner, 151 U. S. 242, 256, *et seq.*
Cf. Ex parte Kearney, 7 Wheat., 38, 42 (cited above).

To sum up, then, it would seem that the principles governing the appellate jurisdiction of this court in criminal cases, when the Act of 1891 was passed, were as follows:

1. This court has no general appellate jurisdiction to re-

view on error or appeal decisions of lower Federal courts in criminal cases, and such jurisdiction must be conferred in clear and explicit language.

United States v. *More, supra.*
Ex parte Yarbrough, supra.
Cross v. *United States, supra.*

2. Appeal and writ of error being the appropriate forms of procedure provided by Congress for the mere correction of error, the appellate jurisdiction of this court for that purpose was limited to the cases in which express provision was made for appeals or writs of error.

In cases not so provided for, neither *habeas corpus* nor *certiorari* could be used to supply the place of a writ of error for the mere correction of error.

Ex parte Gordon, supra.
Ex parte Kearney, supra.
American Const. Co. v. *Jacksonville, etc., Ry. Co., supra.*

3. It would seem that *certiorari* could be issued, under R. S., Sec. 716, as an independent process, *to correct excesses of jurisdiction*, where the circumstances imperatively demanded such interposition (thus again presenting a strong analogy to *habeas corpus*).

Whitney v. *Dick, supra.*
In re Chetwood, supra.
Harris v. *Barber, supra.*

When, therefore, Congress by Section 6 of the Act of 1891 provided for the use of *certiorari* as an instrument for the mere correction of error, to have, when once issued,

exactly the same effect as an appeal or writ of error, it established an entirely new use of the writ; and the appellate jurisdiction for the correction of error in crimnial cases given to this court by that section, was an entirely new jurisdiction, and not, as argued on page 19 of the Government's brief, a reservation of an existing jurisdiction. The cases of *ex parte Gordon* and *American Const. Co.* v. *Jacksonville, etc., Ry. Co.*, above cited, leave no doubt on that question.

B. CERTIORARI UNDER THE ACT OF 1891.

In that portion of the original brief for the respondent dealing with the question of jurisdiction, the attempt was made to discuss every ground of distinction which could be suggested between the case at bar and the *Sanges* case. The Government's brief, however, seems to suggest a further ground, in the fact that this case has already been once appealed, and that the decision of which review is now sought is the decision of an appellate court. But there is no more precedent for reviewing in a criminal case a decision of an appellate court in favor of the defendant than a decision of the trial court; and at least two of the cases cited and relied on by this Court in the *Sanges* case were cases in which the defendant, having been convicted in the trial court, had secured in an appellate court an order setting aside the judgment against him and directing a new trial, and in which the Government sought, as in the present case, to obtain review in a still higher court of the decision of the first appellate court. These cases are:

People v. *Royal*, 1 Scammon (Ill.), 557.
People v. *Carnal*, 6 N. Y. 463.

The Government's brief (p. 15) refers to the fact that if, under the Act of 1879, and before the Act of 1891, a crim-

inal case was taken by writ of error from the District Court to the Circuit Court, and there was a difference of opinion in the Circuit Court, the Government could have the question certified to this Court. That procedure finds its analogy in the present law in the power of the judges of the Circuit Court of Appeals to certify to this Court, before decision, any questions on which they desire advice. There was never, before the Act of 1891, any procedure by which a decision once rendered in favor of the defendant in a criminal case, in any court of the United States, could be reviewed in a higher court, and the respondent's contention is that section 6 of the Act of 1891 cannot fairly be construed as intended to make that "serious and far-reaching innovation in criminal procedure."

The Act of 1879 is suggestive on another point. It made the allowance of the writ of error for which it provided discretionary with the circuit judge or circuit justice "on consideration of the importance and difficulty of the questions presented in the record" (20 Stat. 354). There is, therefore, nothing new in the discretionary feature of the provision for *certiorari* in the Act of 1891—no reason for regarding that feature as putting the provision in a class by itself, outside the general principle illustrated by the *Sanges* case.

On pages 15-16 of the original brief it is suggested that it cannot have been an essential ground of the decision in the *Sanges* case that the jurisdiction of this Court was there sought to be invoked by the Government *as of right*, since the Government had since 1789 had the right to invoke the jurisdiction of this Court in criminal cases, *before decision in the court below*, whenever there was a difference of opinion between the judges of the Circuit Court. No cases were there cited in support of that statement.

This omission is now supplied by reference to the follow-

ing cases, which were certified to this Court at the Government's request:

United States v. *Holmes*, 5 Wheat., 412, 415.
United States v. *Wilson*, 7 Pet., 150, 154.
United States v. *Brewster*, 7 Pet., 164, 165.
United States v. *Bailey*, 9 Pet., 238, 241.
United States v. *Bailey*, 9 Pet., 267, 271.
United States v. *Britton*, 107 U. S., 655, 660.
United States v. *Hess*, 124 U. S., 483, 485.

II.

ADDITIONAL AUTHORITIES ON THE VALIDITY OF THE VERDICT.

The second important addition to the Government's brief is the discussion on pp. 40-45 under the heading, *"As consent cannot endow a tribunal with jurisdiction, so it cannot divest it of jurisdiction that has once attached."* To this general proposition the respondent gives immediate assent. No attempt was made in the present case to agree that the court should no longer have jurisdiction. The attempt was exactly opposite—to agree that the court might proceed in a manner wholly outside its jurisdiction.

In answer to the Government's distinction between *jurisdiction* and *due process of law*, and the attempt, under the heading above quoted, to define the question of jurisdiction as applied to the present case, it is sufficient to quote the following passage from

In re Bonner, 151 U. S. 242, 256-258.

> We are unable to agree with the learned counsel, but are of the opinion that in all cases where life or liberty

is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms. There has been a great deal said and written, in many cases with embarrassing looseness of expression, as to the jurisdiction of the courts in criminal cases. From a somewhat extended examination of the authorities we will venture to state some rule applicable to all of them, by which the jurisdiction as to any particular judgment of the court in such cases may be determined. It is plain that such court has jurisdiction to render a particular judgment only when the offence charged is within the class of offences placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, *is void*. Proceeding within these limitations, its action may be erroneous, but not void.

To illustrate: In order that a court may take jurisdiction of a criminal case, the law must, in the first instance, authorize it to act upon a particular class of offences within which the one presented is embraced. Then comes the mode of the presentation of the offence to the court. That is specifically prescribed. If the offence be a felony, the accusation in the Federal court must be made by a grand jury summoned to investigate the charge of the public prosecutor against the accused. Such indictment can only be found by a specified number of the grand jury. If not found by that number, the court cannot proceed at all. If the offence be only a misdemeanor, not punishable by imprisonment in the penitentiary, *Mackin* v. *United States*, 117 U. S. 348, the accusation may be made by indictment of the

grand jury or by information of the public prosecutor. An information is a formal charge against the accused of the offence, with such particulars as to time, place, and attendant circumstances as will apprise him of the nature of the charge he is to meet, signed by the public prosecutor. When the indictment is found, or the information is filed, a warrant is issued for the arrest of the accused to be brought before the court, unless he is at the time in custody, in which case an order for that purpose is made, to the end, in either case, that he may be arraigned and plead to the indictment or information. When he is brought before the court, objections to the validity or form of the indictment or information, if made, are considered, or issue is joined upon the accusation. When issue is thus joined, *the court must proceed to trial by a jury, except in case of the accused's confession. It cannot then proceed to determine the issue in any other way.* When the jury have rendered their verdict, the court has to pronounce the proper judgment upon such verdict—and the law, in prescribing the punishment, either as to the extent, or the mode, or the place of it, should be followed.

The Government concedes (Brief, p. 43) that a trial beginning with twelve jurors and ending with ten could not be forced on the defendant against his will, because of the Sixth Amendment. But that amendment, so far as material to the present case, guarantees only a "trial by jury." If a trial without a full jury throughout is not a trial by jury under the Sixth Amendment, it is not a trial by jury under the Third Article. Either such a trial is void under the Third Article, or the defendant can be compelled to submit to it notwithstanding the Sixth Amendment.

The respondent takes this opportunity to cite, in support of the argument on page 82 of the original brief, that trial

by other than the tribunal authorized by law is only a species of arbitration, the case of

Graham v. *Bayne,* 18 How. 60,

where trial of a civil case by the court without jury, in the absence of statutory authority, was put on exactly that footing.

Respectfully submitted,

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JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States

October Term, 1908. No. 668.

UNITED STATES,
Petitioner,

vs.

JOHN W. DICKINSON,
Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

SECOND SUPPLEMENTAL BRIEF FOR THE RESPONDENT.

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Supreme Court of the United States

UNITED STATES,
PETITIONER,

v.

JOHN W. DICKINSON,
RESPONDENT.

On Writ of Certiorari to the Circuit Court of Appeals for the First Circuit.

SECOND SUPPLEMENTAL BRIEF FOR THE RESPONDENT.

The Government's supplemental brief on the question of jurisdiction, as seen by counsel for the respondent in proof, subject to revision, lays great stress on the fact that a constitutional question is involved in this case. It would seem, however, that at least one point in connection with the question of jurisdiction here raised was settled by the *Sanges* case, if that case is authority for nothing else—namely that the presence here of a constitutional question cannot be the test of jurisdiction.

If the *Sanges* case had decided that the purpose of Congress to secure review by this Court of all decisions on constitutional questions, as expressed in Section 5 of the Act of 1891, went so far as to override the traditional finality

of decisions in favor of the defendant, it might then be contended with some force that the same innovation must have been intended in the provision for *certiorari* in Section 6, *at least so far* as that provision might become applicable to criminal cases involving constitutional questions. The decision in the *Sanges* case having been directly opposite, the bottom drops out of the argument, and the jurisdiction in the present case must be supported, if at all, on grounds having no reference to the presence of a constitutional question.

To the other arguments advanced in the Government's supplemental brief, counsel for the respondent do not deem it necessary to reply specifically, any further than has been done in the oral argument and the briefs already filed.

For another purpose, however, a few further considerations must be presented. The suggestions made from the bench during the oral argument, directing the inquiry to the broad general purposes of the Act of 1891, have since received a careful consideration which there was then no opportunity to give them. The result of this consideration is here submitted.

To determine the inferences to be drawn from the provisions of the Act of 1891, it is necessary first to inquire in what respects that Act involved the introduction of new principles.

Looking broadly at the provisions governing the appellate jurisdiction of this Court before the Act of 1891, we find that Congress evidently had in mind from the first the danger of over-crowding the docket of the Supreme Court, if the right to obtain review in that Court of the decisions of inferior courts were extended to all, or nearly all, of the cases over which the inferior courts had jurisdiction—a danger particularly to be avoided in the case of a court charged with greater responsibilities and more important

functions than were ever before entrusted to a judicial tribunal under any government. As a result the decisions of the lower Federal courts which were not reviewable by the Supreme Court (meaning, of course, in the case of decisions of the Circuit Courts, that they were not reviewable anywhere), always constituted a very considerable proportion of the total. Without attempting an accurate or complete statement of the various acts of Congress on the subject, the general line of classification may be indicated as follows:

(1) Decisions in criminal cases were not generally reviewable by this Court until provision was made in 1889 for writs of error in capital cases.

(2) Review of civil cases at common law, and of equity, admiralty and maritime cases was generally dependent on the amount in controversy. The figure set varied in different statutes, but the original standard was $2,000, and this was subsequently raised, for most cases, to $5,000.

(3) Cases involving particular classes of questions, or arising under particular laws, were from time to time made reviewable without regard to the amount involved; such, for example, as patent, copyright and trademark cases, "civil rights cases," and those in which a jurisdictional question was raised in the Circuit Court.

(4) In at least two instances the right of review was made dependent on the discretion of a court or judge. This was done in a provision relating to prize cases in the District Courts involving less than $2,000, and one relating to civil cases in the District of Columbia involving from $100 to $1,000 (R. S., Sects. 695, 706).

For summaries of the appellate jurisdiction of the Supreme Court before 1891, reference may be made to

2 Foster's Federal Practice (ed. of 1892), pp. 969-971.

Taylor's Jurisd. & Proc. of U. S. Sup. Ct. (ed. of 1905), Secs. 12, 13; pp. 21-26.

In course of time, however, the growth of the country and the increase of litigation, together with a tendency on the part of Congress to add from time to time new classes of cases to those reviewable here, resulted in the overcrowding it had always been desired to avoid. The Circuit Court of Appeals Act was the result.

Its primary object, as very clearly stated by this court in the passage quoted from

American Construction Co. v. *Jacksonville, etc., Ry. Co.*, 148 U. S., 372, 380,

on page 8 of the respondent's original brief, "was to relieve this Court of the overburden of causes and controversies" by transferring to the Circuit Court of Appeals a large part of the appellate jurisdiction of the Supreme Court.

This was not, however, the only object accomplished. The creation of a new appellate court in every circuit, and the relief afforded to this court, made it possible, first, to provide for review either in the Circuit Court of Appeals or in this Court of some decisions of which there had previously been no review at all (not because they were not of the character usually reviewable in appellate courts in common law jurisdictions, but because there had previously been no room for them); and, second, to make a re-classification of the cases reviewable in the Supreme Court.

This re-classification departed considerably from the old lines. The amount in controversy, which had originally been the principal test, was retained as such in only one provision of the Act. The tendency had constantly grown, in the legislation of Congress on this subject, to classify by

the nature and Federal importance of the questions involved, rather than by the character of the case as civil or criminal, or the amount in controversy. In accordance with this tendency the Act of 1891, in defining the appellate jurisdiction of this Court over the decisions of the Circuit and District Courts, included all cases involving a jurisdictional question, all cases of capital and infamous crimes against the United States, and all cases, civil or criminal, involving constitutional questions. When the framers of the law came to define the appellate jurisdiction of this Court over the Circuit Court of Appeals, they evidently approached the question from the same general point of view, but recognized the practical difficulty of fully attaining, by any arbitrary general definition, the desired object of selecting, out of the whole number of cases which might arise, those most demanding the attention of this court. Accordingly, after going a certain way in explicit classification, they adopted a provision which added to the cases expressly enumerated all others which this Court itself should deem exceptionally important.

In this mode of classification, Congress followed, with appropriate modifications, the precedent set by the earlier provisions above referred to, in which the appellate jurisdiction of the Supreme Court in certain cases was made dependent upon the discretion of a court or judge as to the importance of the questions raised. Compare, also, the discretionary feature of the Act of 1879 providing for review in the Circuit Courts of criminal cases from the District Courts, referred to on page 10 of the respondent's first supplemental brief, and the somewhat similar feature of the appellate jurisdiction of the Supreme Court over the decisions of State courts. (*Spies* v. *Illinois*, 123 U. S., 131.)

The objects which Congress sought to attain by the Act of 1891, as disclosed by a study of the Act itself, in com-

parison with the previously existing law, would thus appear to be the following:

1. To relieve this court from the overcrowding of its docket.

2. To provide a review *somewhere* in all cases tried in the Circuit and District courts.

3. By a new classification of the appellate jurisdiction of this court, to select for its attention more exactly than under any previous law, those cases most demanding its consideration.

Does it follow from the recognition of any of these objects that Congress must have intended, in the provision of Section 6 for *certiorari*, to make the "serious and far-reaching innovation" referred to in the *Sanges* case? The first object certainly does not suggest that conclusion. The second requires brief consideration. Did Congress intend merely to bring the Federal jurisprudence more nearly into line with the judicial systems of the States and of England, (to which it had in respect of appellate jurisdiction presented a marked contrast), by providing for review in some appellate court of all judgments and decrees of trial courts of the kinds generally reviewable under common law systems, or to go further and provide for review of a class of decisions traditionally not reviewable at all? The former conclusion is the natural one, and in the absence of a plain indication of the latter intent, almost the inevitable one. It is submitted that the reasoning which led to a unanimous decision by this court, upon this very statute, in the *Sanges* case, as well as the *authority* of that case, is convincing on this point—especially since that decision was rendered so near to the time of the passage of the Act as to make it undoubtedly easier for the Court to judge of the probable intent of Congress, if the

question was a close one, than in the present day when conditions have undergone a considerable change.

The jurisdiction in the present case must be sustained, if at all, by the discovery of a purpose peculiarly manifested by the provision for *certiorari*. The argument would be somewhat as follows: In carrying out the third of the purposes above enumerated, and defining anew the appellate jurisdiction of the Supreme Court, Congress intended to enable this Court to decide all questions particularly important from a national standpoint, or in which error, uncertainty or conflict arising from decisions in the circuits would be particularly unfortunate; but preserving the traditional finality of decisions in criminal cases in favor of the accused, would prevent the complete accomplishment of this purpose; an intent to authorize review of such decisions is therefore manifest from the general purpose of the provision for *certiorari*. The difficulty with this argument is that the provision for *certiorari* is only one of the provisions designed to secure the general purpose just above stated. The provision for direct review of constitutional questions had precisely the same object. The provision for direct review of all cases of capital or infamous crimes, while doubtless inserted partly out of consideration to the accused, recognized also the practical importance of a uniform construction of the more important criminal statutes. Yet the latter provision was expressly limited to review in behalf of the defendant, and the former is held in the *Sanges* case to be so limited. It is also declared in that case that the same limitation applies to the appellate jurisdiction of the Circuit Court of Appeals.

The question is not whether Congress might not conceivably have entertained a purpose which would go to the length involved in the argument above suggested, but whether Congress in fact manifested such a purpose in this particular Act. Looking at the Act as a whole, and at the

established judicial construction of certain of its provisions, it is clear that no such intent is manifested.

It is important to observe that the Act as originally passed gave exclusive appellate jurisdiction to this Court in all cases of infamous as well as capital crimes. It is particularly difficult to presume an affirmative intent, in a single provision of the Act, to break down the traditional limitation of review in criminal cases to decisions against the accused, when that provision, as the Act was originally passed, could never become operative upon any criminal case except a petty one, and if it ever became operative upon a petty criminal case in which a constitutional question chanced to be involved, would become so in spite of, and not because of the constitutional question.

Any distinction between the present case and cases arising under the other provisions of the Act of 1891, involves still another inconsistency. In order to infer that Congress felt the necessity for a review, under the provision for *certiorari*, of a class of decisions which form an exception under any other provision of the Act, we must assume that Congress had a confidence in the decisions of single judges of the Circuit and District Courts, rendered in the course of trial proceedings, which was not accorded to the decisions of three of the same judges sitting in a Circuit Court of Appeals and deciding questions after full argument and mature consideration.

In connection with the importance attached, in the foregoing discussion, to the provision of the Act as originally passed relating to infamous crimes, which was struck out by amendment in 1897 (29 Stat., 492), it is hardly necessary to add that if the Act as first passed did not manifest an intention to make, in any of its provisions, the innovation now in question, that innovation was not enacted into the provision for *certiorari* by the amendment of 1897.

The respondent has treated the *Sanges* case as an authority on the questions covered by the opinion, and as a starting point for the argument of the present case, without attempting any restatement of the reasoning which resulted in that decision, feeling that it would hardly be proper to occupy the time of the Court with a reargument of propositions there fully considered and decided. It is submitted, however, that apart from the effect of that case as an authority, a re-examination of the opinion will serve only to enforce anew the conclusions which the Court there announced with reference to the very Act now under consideration.

ERRATUM.

A careless error on page 10 of the respondent's first supplemental brief may here be corrected. Near the bottom of the page, "1789" should read "1802."

Respectfully submitted,

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UNITED STATES *v.* DICKINSON.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 362. Argued January 4, 5, 1909.—Decided April 5, 1909.

The writ of certiorari cannot be granted under the act of March 3, 1891, c. 517, 26 Stat. 826, in a criminal case at the instance of the United States whatever the supposed importance of the questions involved. *United States* v. *Sanges*, 144 U. S. 310, distinguished.

The power of this court to issue the writ of certiorari under § 14 of the Judiciary Act of 1789, now § 716, Rev. Stat., is not a grant of appellate jurisdiction to review for correction of mere error.

The act of March 2, 1907, c. 2564, 34 Stat. 1246, giving an appeal to the Government in certain criminal cases cannot be extended beyond its terms, or construed so as to extend the power of certiorari under the act of March 3, 1891, c. 517, 26 Stat. 826, to bring up a criminal case for the correction of mere error at the instance of the United States.

Certiorari to review 159 Fed. Rep. 801, dismissed.

THE facts are stated in the opinion.

The Attorney General and *Mr. Asa P. French*, with whom *The Solicitor General* was on the brief, for petitioner:

This court has power under the Judiciary Act of 1789, "to

issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law," and that includes the right to issue writs of certiorari in all proper cases. *In re Chetwood*, 165 U. S. 443, 462.

The writ of certiorari, under the Federal Constitution and statutes, is strictly the common law writ of that name with all its functions and attributes, so far as applicable to our system of jurisprudence.

At common law the writ might be granted at the instance of either the prosecutor or the defendant; it was always granted at the request of the king, in whose name the justice of the people was invoked. 4 Blackstone's Commentaries, 321. Certiorari lies in all judicial proceedings in which a writ of error does not lie. *Groenvelt* v. *Burwell*, 1 Ld. Raym. 454.

By anology the enforcement of the law by the people in the name of the king is the same as its enforcement by the people in the name of the United States, and there is ancient authority in support of granting this writ by this court. The part taken in these proceedings by the United States is entirely in accord with the usages and principles of the common law, as referred to in the act of 1789.

The case at bar is within the appellate jurisdiction of this court. Section 5 of the act of March 3, 1891, provides that such a case involving the construction or application of the Constitution of the United States may be brought here on appeal or writ of error.

Under a proper construction of the act of March 3, 1891, this court may take away from the final determination of any Circuit Court of Appeals, at any stage, before or after decision rendered in that court, any case involving questions of gravity and general importance, or as to which there is conflict between the decisions of state and Federal courts, or between those of Federal courts in different circuits, and indeed involving any matter of special interest to the people. *Forsyth* v. *Hammond*, 166 U. S. 506, 514, 515; *Fields* v. *United States*, 205 U. S. 296;

American Construction Co. v. *Jacksonville &c. Ry. Co.*, 148 U. S. 383, 384. This court has the same right to review a criminal case on certiorari on the application of the Government that it has to review a civil case.

Congress has power upon the establishment of an inferior tribunal, to reserve authority in this court to review all important cases, criminal as well as civil, on certiorari. *Taylor* v. *United States*, 207 U. S. 120, 127; *United States* v. *Bitty*, 208 U. S. 393, 399, 400.

While it was held in *United States* v. *Sanges*, 144 U. S. 310, 323, that § 5 of the act of March 3, 1891, was not sufficiently specific to give to the United States the right to sue out a writ of error to review a judgment of a Circuit Court sustaining a demurrer in a criminal case in which that court held certain Federal statutes to be unconstitutional, the case at bar presents a different situation under a different provision of law. The Government is now merely asking that this court shall, under the jurisdiction reserved to it by § 6 of the act, order a case of which a Circuit Court of Appeals has otherwise final jurisdiction to be brought here from such court on certiorari, and determine it in the same manner as if it were here on appeal or writ of error.

The jurisdiction of this court to review on certiorari cases within the final jurisdiction of a Circuit Court of Appeals and pending in that court extends to all cases which are of sufficient gravity and importance to make their decision by this court imperative or desirable, including a criminal case, like that at bar.

Mr. Henry W. Dunn, with whom *Mr. Samuel L. Powers* was on the brief, for respondent:

While this court, under § 716, Rev. Stat., and independently of the act of March 3, 1891, may issue writs of certiorari in proper cases, when the circumstances imperatively demand that form of interposition, to correct excesses of jurisdiction, and in the furtherance of justice, *Ex parte Chetwood*, 165 U. S. 443, this is not a proper one for the exercise of that extraor-

dinary power. The question of jurisdiction must be decided by construction of the provisions of the act of 1891. *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 380.

While any limitation in the matter of direct appeals under § 5 of the act of March 3, 1891, in respect to criminal cases must be read into the statute wholly by implication, nevertheless the right of review given by that section, so far as it relates to criminal cases, must be limited to review at the instance of the defendant, after a decision in favor of the Government. It could not be fairly inferred that Congress intended to authorize a review in a criminal case of a decision in favor of the accused. *United States* v. *Sanges*, 144 U. S. 310. It cannot be doubted that under the authority of that case, and on the same grounds, the general provision of § 6 granting appellate jurisdiction to the Circuit Court of Appeals, should be held subject to the same limitation.

The intent of Congress as expressed in the act of 1891 must be judged without any reference to the recent attempts to strengthen the arm of the Government, in certain classes of prosecutions. Such conditions have found natural expression in such recent legislation as the act of Congress which was before this court in *Taylor* v. *United States*, 207 U. S. 120, and *United States* v. *Bitty*, 208 U. S. 393.

This court has no general authority to review, on error or appeal, the judgments of the Circuit Courts of the United States in cases within their criminal jurisdiction; and when such jurisdiction is intended to be conferred, it should be done in clear and explicit language. *Cross* v. *United States*, 145 U. S. 571, 574.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

Dickinson and one Foster were jointly indicted under § 5209 of the Revised Statutes of the United States, which is a part

of the National Bank Act. Foster, the principal defendant, was cashier of the South Danvers National Bank, and was charged with willfully misapplying the funds of the bank, and Dickinson was charged with aiding and abetting. Both having been convicted, Dickinson sued out a writ of error from the Circuit Court of Appeals for the First Circuit, and after argument that court held his conviction invalid by reason of the fact that the verdict against him was found by a jury of only ten men. 159 Fed. Rep. 801. On a writ of certiorari issued on petition of the United States the case was brought to this court.

It appeared in the course of the trial that one of the jurors by reason of illness was unable to sit further, whereupon the following agreement, signed by the parties, was filed of record:

"Whereas, one of the jurors impanelled to try the above-entitled indictment is unable by reason of illness to further sit therein,

"Now, therefore, we consent and agree that the said juror, to wit, Charles F. Low, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining eleven jurors with the same force and effect as if said juror had not been discharged."

The court then proceeded with the trial with the remaining eleven jurors. Subsequently, the trial being still unfinished, death occurred in the family of one of them, and another like agreement was filed of record as to him.

The trial proceeded with the remaining ten jurors, who returned a verdict of guilty, and thereupon a motion in arrest of judgment was filed as follows:

"And now, after verdict against the said John W. Dickinson, and before sentence, comes the said John W. Dickinson, by his attorneys, and moves the court here to arrest judgment herein and not pronounce the same, because of manifest errors in the record appearing, to wit: Because the said verdict against the said John W. Dickinson was found by a so-called jury consisting of ten (10) jurors only, and not by a jury of twelve (12)

jurors, as required by the Constitution and laws of the United States, and because no judgment against him, the said John W. Dickinson, can be lawfully rendered on said verdict."

This motion was overruled, and a bill of exceptions to the ruling was duly allowed on the same day, and defendant was sentenced by the court to nine years' imprisonment in the jail at Dedham.

The judgment of the Circuit Court of Appeals was—

"The judgment of the District Court and the verdict therein are set aside; and the case is remanded to that court for further proceedings in accordance with law."

Application was then made to this court for a writ of certiorari, which, because of the urgency of the Government as to the importance of the particular decision, was granted, notwithstanding the judgment of the Circuit Court of Appeals was not final.

Nevertheless, we are met at the threshold by the objection that the writ of certiorari cannot be granted under the act of 1891 in a criminal case, whatever the supposed importance of the question involved.

In our opinion it is clear that the question of jurisdiction must be decided by the proper construction of the act of March 3, 1891. That act (March 3, 1891, c. 517, 26 Stat. 826) was framed for the purpose of relieving the Supreme Court from the excessive burden imposed upon it by its increasingly crowded docket, and assigned to the Circuit Courts of Appeals thereby established a considerable part of the appellate jurisdiction formerly exercised by the Supreme Court. *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372.

Section 6 reads as follows:

"The Circuit Courts of Appeals . . . shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, . . . and the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the

jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the Circuit Court of Appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.

"And, thereupon, the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the Circuit Courts of Appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

"And exceping also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

At the time when this act was passed the only existing method by which a decision of the Supreme Court could be obtained on a question of law arising in a criminal case not capital was upon certificate of difference of opinion by the judges of the Circuit Court, under §§ 651 and 697 of the Revised Statutes. In capital cases, by the act of February 6, 1889, 25 Stat. 656, c. 113, § 6, the defendant was given the right to obtain a review in this court by writ of error. The act of 1891 superseded the existing statutory provisions as to a certificate of difference of opinion. *United States* v. *Rider*, 163 U. S. 132; *The Paquete Habana*, 175 U. S. 677.

By clause 5, appeals or writs of error from the District and

Circuit Courts direct to the Supreme Court might be taken in cases involving the construction or application of the Constitution of the United States, or where the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority was drawn in question, and in cases in which the constitution or law of a State was claimed to be in contravention of the Constitution of the United States.

The clauses as to appeals or writs of error where constitutional questions were involved made no distinction in their language between civil and criminal cases, and no distinction as to the party who was aggrieved by the decision in the court below; but in *United States* v. *Sanges*, 144 U. S. 310 (decided April 4, 1892), it was held, on great consideration, that the right of review given by that provision of § 5, so far as it related to criminal cases, must be limited to review at the instance of the defendant after a decision in favor of the Government. The decision was reached after a thorough examination of the Federal legislation as to appellate jurisdiction in criminal cases and of the authorities in England and in the United States relating to criminal appeals, in which the court finds no precedent without express statutory enactment for any review of any judgment in favor of the accused. And the case proceeded upon the grounds thus summed up in the concluding paragraph of the opinion:

"In none of the provisions of this act, defining the appellate jurisdiction, either of this court, or of the Circuit Court of Appeals, is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States."

As we have before observed, the certiorari in this case is the certiorari provided for by the act of 1891, being in the nature of an appeal or writ of error for the mere correction of error, a new use of the writ.

Section 14 of the Judiciary Act of 1789 gave to the Supreme Court and the Circuit and District Courts "power to issue writs of *scire facias, habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law," but that was not a grant to this court of appellate jurisdiction to review by certiorari for the mere correction of error any or all decisions of the lower Federal courts not otherwise reviewable.

In *United States* v. *More*, 3 Cranch, 159, 172, Mr. Chief Justice Marshall said:

"In support of the jurisdiction of the court, the attorney general has adverted to the words of the Constitution, from which he seemed to argue, that as criminal jurisdiction was exercised by the courts of the United States, under the description of 'all cases in law and equity arising under the laws of the United States,' and as the appellate jurisdiction of this court was extended to all enumerated cases, other than those which might be brought on originally, 'with such exceptions, and under such regulations, as the Congress shall make,' that the Supreme Court possessed appellate jurisdiction in criminal, as well as civil cases, over the judgments of every court, whose decisions it would review, unless there should be some exception or regulation made by Congress, which should circumscribe the jurisdiction conferred by the Constitution.

"This argument would be unanswerable, if the Supreme Court had been created by law, without describing its jurisdiction. The Constitution would then have been the only standard by which its powers could be tested, since there would be clearly no Congressional regulation or exception on the subject.

"But as the jurisdiction of the court has been described, it has been regulated by Congress, and an affirmative description of its powers must be understood as a regulation, under the Constitution, prohibiting the exercise of other powers than those described." *Ex parte Yarbrough*, 110 U. S. 651, 653;

Cross v. *United States*, 145 U. S. 571, 574. In the latter case we said:

"We have, of course, no general authority to review, on error or appeal, the judgments of the Circuit Courts of the United States in cases within their criminal jurisdiction, or those of the Supreme Court of the District of Columbia or of the Territories; and when such jurisdiction is intended to be conferred, it should be done in clear and explicit language."

The decisions to that effect are very numerous and it is quite inadmissible to hold that criminal cases cannot be reviewed here by writ of error or appeal without express statutory authority, but may be by certiorari under Revised Statutes, § 716, for the correction of any error that may have been committed by the lower courts; and our decisions are to the contrary.

In *Ex parte Gordon*, 1 Bl. 503, it was ruled that neither a writ of error, a writ of prohibition, nor certiorari, would lie from the Supreme Court to a Circuit Court of the United States in a criminal case, and that the only case in which the court was authorized even to express an opinion on the proceedings in a Circuit Court in a criminal case was where the judges of the Circuit Court were opposed in opinion upon a question arising at the trial and certified it to this court for its decision.

It is true that in the case of *Chetwood*, 165 U. S. 443, 462, we allowed the writ to bring up for review certain final orders of the Circuit Court, which interfered with causes pending in this court; and the question of the issue of the writ by this court in the exercise of an inherent general power under the Constitution did not arise. *In re Tampa Suburban R. R. Co.*, 168 U. S. 583.

And in *Whitney* v. *Dick*, 202 U. S. 132, it was said that the power of the court to issue original and independent writs of certiorari might be upheld under the authority given by § 716, citing *Ex parte Vallandigham*, 1 Wall. 243, and cases; *Ewing* v. *St. Louis*, 5 Wall. 413; *Ex parte Lange*, 18 Wall. 163; and quoting from the opinion of Mr. Justice Gray in *American Construction Co.* v. *Jacksonville Railway*, 148 U. S. 372, where an

application was made for mandamus and certiorari, as follows:

"Under this provision, the court might doubtless issue writs of certiorari in proper cases. But the writ of certiorari has not been issued as freely by this court as by the Court of Queen's Bench in England. *Ex parte Vallandigham*, 1 Wall. 243, 249. It was never issued to bring up from an inferior court of the United States for trial a case within the exclusive jurisdiction of a higher court. *Fowler* v. *Lindsey*, 3 Dall. 411, 413; *Patterson* v. *United States*, 2 Wheat. 221, 225, 226; *Ex parte Hitz*, 111 U. S. 766. It was used by this court as an auxiliary process only, to supply imperfections in the record of a case already before it; and not, like a writ of error, to review the judgment of an inferior court. *Barton* v. *Petit*, 7 Cranch, 288; *Ex parte Gordon*, 1 Black, 503; *United States* v. *Adams*, 9 Wall. 661; *United States* v. *Young*, 94 U. S. 258; *Luxton* v. *North River Bridge*, 147 U. S. 337, 341."

But the distinction between preventing excesses of jurisdiction and the mere correction of error is a fundamental one, and the rule remains that appeal and writ of error, being the proper forms of procedure provided for the mere correction of error, the appellate jurisdiction of this court for that purpose is limited to the cases in which express provision is made for appeals or writs of error, and that certiorari cannot be independently used to supply the place of a writ of error for the mere correction of error.

The construction of the act of 1891, must be arrived at without reference to such recent legislation as the act of Congress of March 2, 1907, c. 2564, 34 Stat. 1246, providing for writs of error in certain instances in criminal cases, in respect of which this court held in *United States* v. *Keitel*, 211 U. S. 398, "that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor

of the United States is limited by the very terms of the statute to authority to reëxamine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same."

So far as that statute is an innovation in criminal jurisdiction in certain classes of prosecutions, it cannot be extended beyond its terms.

Writ of certiorari dismissed.

MR. JUSTICE MOODY took no part in the consideration and disposition of this case.